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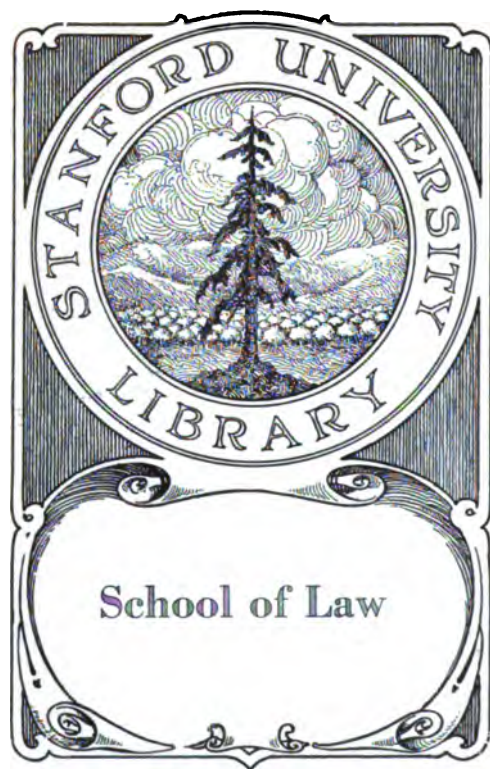
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**A TREATISE**  
**ON THE**  
**LAW OF JUDGMENTS.**

**INCLUDING ALL FINAL DETERMINATIONS OF THE RIGHTS  
OF PARTIES IN ACTIONS OR PROCEEDINGS  
AT LAW OR IN EQUITY.**

**By A. C. FREEMAN,**  
**COUNSELOR AT LAW.**

**FOURTH EDITION, REVISED AND GREATLY ENLARGED.**

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# LAW OF JUDGMENTS.

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## CHAPTER XIII.

### IMPEACHING JUDGMENT.

§ 334. When impeachable, and by whom.

§ 335. What strangers may impeach.

§ 336. For fraud and collusion.

§ 337. For error or irregularity.

§ 337 a. Impeaching in bankruptcy.

§ 334. When Impeachable, and by whom.—Having in a preceding chapter shown when and under what circumstances a judgment may be avoided for want of jurisdiction over the parties and the subject-matter, and intending in a subsequent chapter to state the rules applicable when relief from a judgment is sought by a suit in equity, or by an equitable defense to an action at law, we shall in this chapter consider when judgments not void for want of jurisdiction, nor attacked by any equitable suit or defense, may, nevertheless, be wholly or partly avoided when offered in evidence in an action or proceeding at law. It has been said that “the distinction between cases in which judgments may and those in which they may not be impeached collaterally, as derived from the authorities and founded in common sense, may be stated thus: They may be impeached by facts involving fraud or collusion which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court

and passed upon.”<sup>1</sup> But this language, in our judgment, does not correctly state the distinction. It is true that fraud and collusion are the chief grounds available for the purpose of impeaching judgments. But they are not available for the purposes of impeachment merely because they were not before the court nor involved in any of the issues in the former action. The parties to an action cannot impeach or set at naught the judgment in any collateral proceeding on the ground that it was obtained through fraud or collusion. It is their business to see that it is not so obtained. If, without any fault or neglect of one party, his adversary succeeds, by fraud, in obtaining an inequitable and unauthorized judgment, he must take some proceeding prescribed by law to annul the judgment, and cannot, in the absence of such annulment, treat it as invalid. It is only third persons who have the right to collaterally impeach judgments. They are accorded this right because, not being parties to the action, nothing determined by it is, as to them, *res judicata*. The rule is correctly stated in Cowen, Hill, and Edwards’s note 291 to Phillipps on Evidence, as follows: “Judgments of any court can be impeached by strangers to them for fraud or collusion; but no judgment can be impeached for fraud by a party or privy to it.”<sup>2</sup> A party to a judgment feeling himself aggrieved thereby may, in a proper case, either move that it be vacated, or prosecute an appeal or writ of error, or maintain a suit in equity to enjoin its enforcement. These, unless the judgment is void on its face, are the only remedies open to him, and if he resorts to neither, or resorting to any or all he is denied relief, he cannot avoid the judgment, when offered in evidence against him, by proving that it ought not to have

<sup>1</sup> The Acorn, 2 Abb. 434.

<sup>2</sup> Greene v. Greene, 2 Gray, 361; 61 Am. Dec. 454; Peck v. Woodbridge, 3 Day, 30; Field v. Sanderson, 34 Mo. 542; 86 Am. Dec. 124; Callahan v. Griswold, 9 Mo. 784; Mason v. Messenger, 17 Iowa, 261; Townsend v.

Kerns, 2 Watts, 183; Osborne v. Moss, 7 Johns. 161; 5 Am. Dec. 252; Mosely v. Mosely, 15 N. Y. 334; Williams v. Martin, 7 Ga. 378; Hammock v. McBride, 6 Ga. 178; Smith v. Henderson, 23 La. Ann. 649.

been pronounced, and was procured by fraud, mistake, perjury, or collusion,<sup>1</sup> or through some agreement entered into by the prevailing party, and which he neglected or refused to perform.<sup>2</sup>

§ 335. **What Strangers may Impeach.**—It must not, however, be understood that *all* strangers are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them.<sup>3</sup> Thus an assignee for the benefit of creditors may avoid the effect of a judgment against his assignor by showing that though it appears to have been entered before the assignment was made, it was in fact entered afterward.<sup>4</sup> Where property was purchased after the levy of a writ of attachment upon it, it was held that the purchaser might avoid a judgment subsequently rendered by showing that it was recovered for a greater amount than that which plaintiff was entitled to recover under his complaint.<sup>5</sup> A judgment may be attacked on the ground that it was suffered for the purpose of hindering, delaying, and defrauding creditors, of whom the party making the attack was one;<sup>6</sup> and if a judgment creditor

<sup>1</sup> *Davis v. Davis*, 61 Me. 398; *Olletson v. Middleton*, 102 Pa. St. 78; *Hammond v. Wilder*, 25 Vt. 342; *Kelly v. Mize*, 3 Sneed, 59; *Boston etc. R. R. Co. v. Sparhawk*, 1 Allen, 448; 79 Am. Dec. 750; *Anderson v. Anderson*, 3 Ohio, 109; *Smith v. Smith*, 22 Iowa, 516; *Ogle v. Baker*, 137 Pa. St. 378; *Dilling v. Murray*, 6 Ind. 324; 63 Am. Dec. 385; *Weiss v. Guerinneau*, 109 Ind. 438; *Lowber and Wilmer's Appeal*, 8 Watts & S. 387; 42 Am. Dec. 302; *Hodgdon v. Southern Pac. R. R. Co.*, 75 Cal. 642.

<sup>2</sup> *Frisby v. Withers*, 61 Tex. 134.

<sup>3</sup> *De Armond v. Adams*, 25 Ind. 455;

*Smith v. Cuyler*, 78 Ga. 654; *Eureka L. W. v. Bresnahan*, 60 Mich. 332; *Palmer v. McMaster*, 8 Mont. 186; *Ogle v. Baker*, 137 Pa. St. 378; *Bandon v. Becker*, 3 Clark & F. 479; *Gaines v. Relf*, 12 How. 472; *Leonard v. Bryant*, 11 Met. 370; *Mitchell v. Kintzer*, 5 Pa. St. 216; 47 Am. Dec. 408; *Boisse v. Dickson*, 31 La. Ann. 741; *Fall River v. Riley*, 140 Mass. 488.

<sup>4</sup> *Hunter v. Cleveland Co-operative Stove Store Co.*, 31 Minn. 505.

<sup>5</sup> *Safford v. Weara*, 142 Mass. 231.

<sup>6</sup> *Beeler v. Bullitt*, 3 A. K. Marsh. 280; 13 Am. Dec. 161; *Freeman on Executions*, sec. 136.



seeks to set aside a deed as fraudulent, the grantee may successfully resist such attack by proving that the judgment on which it was based was obtained by fraud.<sup>1</sup> So a sheriff, when a judgment is sought to be used against him, may collaterally impeach it by showing that it was fraudulent as against the creditors whom he represents.<sup>2</sup>

If, when a judgment is entered, no one other than the parties thereto is affected by it, the fact that a third person becomes subsequently interested will not entitle him to impeach it, unless it was entered for the purpose of hindering, delaying, and defrauding creditors subsequent as well as antecedent, and he is one of such creditors. The mere fact that he becomes a creditor of the defendant after a judgment was entered will not enable him to impeach it, if it was not suffered in view of his becoming such creditor.<sup>3</sup> A grantee of land which is subject to a judgment lien cannot attack the judgment on any ground not open to the defendant.<sup>4</sup> A creditor or purchaser from the judgment debtor cannot impeach a judgment except upon the same facts which would entitle him to impeach a deed made by the debtor at the same time and for the same purpose. If a judgment is good as between the parties, it is also good against their creditors, unless it might have operated to defraud them when it was rendered; and though fraud was practiced upon the defendant, this will not enable the creditors or other parties claiming under him to impeach the judgment, unless it was also a fraud upon them.<sup>5</sup>

§ 336. **Fraud.**—Whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some

<sup>1</sup> *Faris v. Durham*, 5 B. Mon. 397; 17 Am. Dec. 77; *Davis v. Davis*, 20 Or. 78; 23 Am. St. Rep. 000.

<sup>2</sup> *Clark v. Foxcroft*, 6 Greenl. 296; 20 Am. Dec. 309.

<sup>3</sup> *Lewis v. Peterkin*, 39 La. Ann. 780; *Darby v. Shannon*, 19 S. C. 526.

<sup>4</sup> *John v. Pattee*, 55 Iowa, 665; *Hogg v. Link*, 90 Ind. 346; *Gallaughier v. Hebrew C.*, 35 La. Ann. 829; *Southmore v. Clark*, 70 Md. 471.

<sup>5</sup> *Thompson's Appeal*, 57 Pa. St. 175; *Dougherty's Estate*, 9 Watts & S. 159; 42 Am. Dec. 326.

third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained.<sup>1</sup> Hence a judgment obtained and suffered for the purpose of delaying and defrauding creditors is void as against them,<sup>2</sup> and continues to be so, though the parties abandon their fraudulent purpose, and seek to use it honestly.<sup>3</sup> But, as we have already shown, the parties to an action, and the persons in privity with them, cannot collaterally attack or impeach a judgment for fraud;<sup>4</sup> and any attack must be regarded as collateral which is made in "any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying" a judgment or decree.<sup>5</sup>

§ 337. **Error and Irregularity.**—The parties to an action or proceeding, and all persons who, though not parties thereto, are not prejudiced by the judgment when rendered, will not be permitted to assail or avoid it in any collateral proceeding for error or irregularity, unless it was such as left the court without jurisdiction and the judgment absolutely void as between the parties thereto.<sup>6</sup> This rule applies to proceedings in bankruptcy, and there-

<sup>1</sup> *Atkinson v. Allen*, 12 Vt. 619; 77 Am. Dec. 712; *Ordinary v. Wallace*, 2 Rich. 460; *De Armond v. Adams*, 25 Ind. 455; *Hackett v. Manlove*, 14 Cal. 85; *Hall v. Hamlin*, 2 Watts, 354; *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527; *Orosby v. Leng*, 12 East, 409; *Lloyd v. Maddox*, Moore L. A. 917; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 281; *Miners' etc. Bank v. Roseberry*, 81 Pa. St. 309; *Second Nat. Bank's Appeal*, 85 Pa. St. 528; *Murcheson v. White*, 54 Tex. 78; *Downs v. Fuller*, 2 Met. 135; 35 Am. Dec. 393; *Smith v. Cuyler*, 78 Ga. 654; *Shallcross v. Beata*, 43 N. J. L. 177.

<sup>2</sup> *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477; *Robinson v. Davis*, 11 N. J. Eq. 302; 69 Am. Dec. 591.

<sup>3</sup> *Bunn v. Ahl*, 29 Pa. St. 387; 72 Am. Dec. 639.

<sup>4</sup> *Ante*, sec. 334.

<sup>5</sup> *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95.

<sup>6</sup> *Gunn v. Plant*, 94 U. S. 664; *Yaple v. Titus*, 41 Pa. St. 195; 80 Am. Dec. 604; *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463; *Paul v. Smith*, 82 Ky. 451; *Lancaster v. Wilson*, 27 Gratt. 624; *Fox v. Cottage B. Ass'n*, 81 Va. 677; *White v. Albertson*, 3 Dev. 241; 22 Am. Dec. 719; *Derr v. Wilson*, 84 Ky. 14; *Bryan v. Kennett*, 113 U. S. 179; *Robertson v. Winchester*, 85 Tenn. 171; *Hilton v. Bachman*, 24 Neb. 490; *Upson v. Horn*, 3 Strob. 108; 49 Am. Dec. 633; *Cox v. Davis*, 17 Ala. 714; 52 Am. Dec. 199; *Saltonstall v. Riley*, 28 Ala. 164; 65 Am. Dec. 324; *Sutherland v. De Leon*, 1 Tex. 250; 48 Am. Dec. 100; *Wiley v. Pavey*, 61 Ind. 457; 28 Am. Rep. 677; *Baudin v. Roliff*, 1 Mart., N. S., 165; 14 Am. Dec. 181; *Jones v. Coffey*, 97 N. C. 347; *Cooley v. Smith*, 17 Iowa, 29; *Spencer v. McGonagle*, 107 Ind. 410; *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95.

fore discharges of bankrupts and other orders and decrees of courts of bankruptcy cannot be collaterally impeached by proving them to be erroneous and irregular.<sup>1</sup> On the other hand, it is said to be "a general and established rule that when a party's right may be collaterally affected by a judgment, which for any cause is erroneous and void, but which he cannot bring a writ of error to reverse, he may, without reversing it, prove it was erroneous and void in any suit in which its validity is brought in question."<sup>2</sup> This language, while perhaps technically correct, is calculated to mislead, by giving the impression that when a judgment is offered in evidence against a third person affected by it when it was entered, the court in which it is so offered will exercise powers similar to those of an appellate tribunal for the purpose of determining whether the court which entered the judgment acted correctly in all respects, and will refuse to give effect to the judgment if it appears that some error contributed to its rendition. This is further, we think, than any court can properly go. If a judgment is void, no doubt it may be collaterally impeached for that reason by a third person injured by its rendition. If it is erroneous, and is also collusive, or if, though not collusive, the nominal defendant made no defense because he had no interest to be protected, a third person may sometimes impeach it for error apparent on the face of the record; but when a real defense was made, we think a stranger affected by the judgment will not be permitted to impeach it by retrying the cause before another court for the purpose of convincing it that a different judgment ought to have been entered in the former action. Though the party seeking to impeach a judgment collaterally is a creditor of the de-

<sup>1</sup> *Palmer v. Hussey*, 119 U. S. 96; *Head v. Daniels*, 38 Kan. 1; *Chapman v. Brewer*, 114 U. S. 158; *Brown v. Covenant L. I. Co.*, 86 Mo. 51; *Wiley v. Pavey*, 61 Ind. 457; 28 Am. Rep. 677; *Blair v. Hanna*, 87 Ind. 293; *Begein v. Brehm*, 123 Ind. 160.

<sup>2</sup> *Vose v. Morton*, 4 Cush. 27; 50 Am. Dec. 750; *Leonard v. Bryant*, 11 Met. 370; *Downs v. Fuller*, 2 Met. 135; 35 Am. Dec. 393; *Griswold v. Stewart*, 4 Cow. 458.

fendant, and its enforcement will therefore operate prejudicially to him, yet he cannot assail it, where it is not collusive, on the ground that the defendant had defenses which he might have asserted, or that in the transaction between the plaintiff and the defendant out of which the judgment grew the former overreached the latter.<sup>1</sup>

§ 337 a. **Impeaching in Bankruptcy.**—A judgment may be impeached for the purpose of showing that it was procured and suffered in the hope of avoiding the operation of the national bankrupt act. To successfully impeach it, it must be shown,—1. That it was procured and suffered within four months prior to the filing the petition in bankruptcy, and with a view of giving plaintiff a preference over other creditors; 2. That the defendant was insolvent at the time; 3. That the plaintiff had reasonable cause to believe the defendant insolvent, and procured the judgment to secure a preference over other creditors. Upon being so impeached, it will be held invalid, and all proceedings based thereon set aside as being superseded by the bankruptcy proceedings.<sup>2</sup> But if the judgment was procured less than four months before filing the petition, it is valid, if not intended to prefer one creditor over another, and thereby to thwart the objects which the act was intended to accomplish.<sup>3</sup> The act was not designed to discourage diligent creditors in collecting their debts, nor will it rob them of their liens procured through such diligence, and not in fraud of the act.<sup>4</sup>

But except for the purpose of showing that it was designed as a means of avoiding the equal distribution of the debtor's property among his creditors, a judgment

<sup>1</sup> *McAlpine v. Sweetser*, 76 Ind. 78; *Sheets v. Hambeat*, 81 Pa. St. 100; *Lewis v. Rogers*, 16 Pa. St. 18; *Meckley's Appeal*, 102 Pa. St. 536.

<sup>2</sup> *Buchanan v. Smith*, 7 Nat. Bank. Reg. 515; *Wilson v. City Bank*, 9 Nat. Bank. Reg. 70; *In re Fuller*, 1 Saw. 245.

<sup>3</sup> *Biddle's Appeal*, 68 Pa. St. 13.

<sup>4</sup> *In re Kerr*, 2 Bank. Reg. 124; *In re*

*Campbell*, Bank. Reg. Supp. 36; 1 L. T. 30; 7 Am. Law Reg. 100; *In re Schnepf*, Bank. Reg. Supp. 41; 7 Am. Law Reg. 214; 2 Ben. 72; *Clark v. Iselin*, 21 Wall. 360; 7 Chic. L. N. 185; 2 Cent. L. J. 210; 11 Bank. Reg. 337; *Wilson v. City Bank*, 17 Wall. 473; 6 Chic. L. N. 149; 9 Bank. Reg. 97; *Little v. Alexander*, 21 Wall. 500; 7 Chic. L. N. 339; 12 Bank. Reg. 134.

is no more liable to collateral impeachment in proceedings under the bankrupt act than it is to such impeachment in the courts of the state where it was rendered.<sup>1</sup> After quite a number of decisions in the lower courts to the contrary, it is now settled by the judgment of the supreme court of the United States, — “1. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due, and he is without just defense to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act; 2. That the fact that the debtor, under such circumstances, does not file a petition in bankruptcy is not sufficient evidence of such preference, or of intent to defeat the operation of the act; 3. That though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law; 4. That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.”<sup>2</sup>

If, when proceedings in bankruptcy, are begun, an action is pending against the bankrupt, in which an attachment has been levied for so great a length of time that it is not released thereby, a judgment may be entered, enforceable against the property attached or against the sureties upon any bond or any other obligation which has been taken to secure the delivery of such property and its application to the satisfaction of the judgment.<sup>3</sup> If, during the progress of the proceedings in bankruptcy,

<sup>1</sup> In re Burns, 1 Bank. Reg. 174; Bank. Reg. Supp. 38; 7 Am. Law. Reg. 105; 24 Leg. Int. 357; In re Campbell, Bank. Reg. Supp. 36; 1 L. T. 30; 7 Am. Law Reg. 100; McKinsey v. Harding, 4 Bank. Reg. 11; Palmer v. Preston, 45 Vt. 159; 12 Am. Rep. 191; In re Whitehouse, 4 Bank. Reg. 15; In re Robinson, 2 Bank. Reg. 108; 6 Blatchf. 253.

<sup>2</sup> Wilson v. Bank of St. Paul, 1 Am. L. T., N. S., 1; 17 Wall. 489; 6 Chic. L. N. 149; 9 Bank. Reg. 97.

<sup>3</sup> Doe v. Childress, 21 Wall. 642; Stoddard v. Locke, 43 Vt. 574; 5 Am. Rep. 308; Hill v. Harding, 130 U. S. 699; Bates v. Tappan, 99 Mass. 376; Gibson v. Green, 45 Miss. 218; Bowman v. Harding, 56 Me. 559.

a judgment is entered against the bankrupt, but before his final discharge is granted he, upon obtaining such discharge, is entitled to have the court in which the judgment was rendered enter a perpetual stay of proceedings thereon.<sup>1</sup> If, however, an action is still pending when his discharge is granted, the bankrupt must call the attention of the court to it by a supplemental pleading, and if he fails to do so, and judgment is given against him, he is conclusively bound thereby, and cannot impeach it in any collateral action or proceeding.<sup>2</sup>

<sup>1</sup> *Boynton v. Bell*, 121 U. S. 457.

<sup>2</sup> *Dimock v. Revere C. Co.*, 117 U. S. 559.

## CHAPTER XIV.

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## PART I.—NATURE AND CREATION OF THE LIEN.

§ 338. **Nature of Judgment Lien.**—"A judgment is not a specific lien on any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens."<sup>1</sup> "In short, a judgment creditor has no *jus in re*, but a mere power to make his general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land."<sup>2</sup> If the debtor should sell the estate, he has no right to follow the proceeds of the sale into the hands of the vendor or vendee, or to claim the purchase-money in the hands of the latter. "A judgment lien on land constitutes no property or right in the land itself. It confers only a right to levy on the same, to the exclusion of other adverse interests subsequent to the judgment; and when a levy is actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, so as to cut out intermediate encumbrances. Subject to this the defendant may convey the land."<sup>3</sup> As a judgment creditor has a mere general lien, he cannot, like a mortgagee or other holder of a specific lien, sue for such waste as injures his security,<sup>4</sup> nor can he maintain an action to foreclose his lien.<sup>5</sup> It must be asserted by a sale of specified land subject thereto, but until such sale, he has no interest in such land, other than the right to sell it. Hence he cannot recover crops produced upon it before the sale;<sup>6</sup> nor sustain an action to be subrogated to the rights of a judgment debtor who is entitled to a conveyance thereof.<sup>7</sup> His

<sup>1</sup> *Rodgers v. Bonner*, 45 N. Y. 379; *Ind. School Dist. v. Werner*, 43 Iowa, 643.

<sup>2</sup> *Ashton v. Slater*, 19 Minn. 347; *Foute v. Fairman*, 48 Miss. 536; *Young v. Templeton*, 4 La. Ann. 254; 50 Am. Dec. 563; *Pettit v. Shepherd*, 5 Paige, 493; 28 Am. Dec. 437; *Witmer's Appeal*, 45 Pa. St. 455; 84 Am. Dec. 505; *Manafield v. Gregory*, 11 Neb. 297; *Doxier v. Lewis*, 27 Miss. 679.

<sup>3</sup> *Conard v. Insurance Co.*, 1 Pet. 378, 443. See also *Doe v. McKnight*, Bart. 376.

<sup>4</sup> *Lanning v. Carpenter*, 48 N. Y. 412; *Ind. School Dist. v. Werner*, 43 Iowa, 643.

<sup>5</sup> *Howe Machine Co. v. Miner*, 28 Kan. 441.

<sup>6</sup> *Dail v. Freeman*, 92 N. C. 351.

<sup>7</sup> *Logan v. Hale*, 42 Cal. 645.

right to sell cannot be impaired by any act of the judgment debtor, nor by any proceeding taken against him by his creditors or others to which the holder of the lien is not a party. When the sale is made and a conveyance executed in pursuance thereof, it has the same effect as if it had been voluntarily executed by the judgment debtor at the moment when the lien first attached.<sup>1</sup> If the debtor since that time has made any conveyance or encumbrance, or suffered a judgment, attachment, or other lien, or has been subjected to any action or proceeding seeking to affect his title to the land sold, such conveyance, lien, or proceeding is unavailing as against the conveyance based upon the judgment lien;<sup>2</sup> and if the property sold was also attached in an action in which a judgment was rendered, the lien of the attachment merges in that of the judgment, and the conveyance relates to the levy of the attachment, and transfers all the interests of the judgment debtor at that time.<sup>3</sup>

If costs are incurred in enforcing a lien, they are to be paid out of the proceeds realized, and are preferred to the lien. This is said to be true where there are several judgment liens, and, through proceedings instituted by the holder of the junior lien, the lands are sold for the purpose of having the proceeds distributed among the lienholders according to their rank and precedence, and the sale does not produce funds sufficient to satisfy even the senior lien.<sup>4</sup> This, said the court, "seems to us a very just practice. Even the senior lien could not have been enforced without the same costs, and it has no right to expect a junior one to await its enforcement. They have

<sup>1</sup> *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Union Bank v. Maynard*, 51 Mo. 548; *Davis v. Ownsby*, 14 Mo. 170; 55 Am. Dec. 105; *Decker v. Gilbert*, 80 Ind. 107; *Brooker v. Sprague*, 99 Ind. 169; *Rodgers v. McCluer*, 4 Gratt. 81; 47 Am. Dec. 715; *Agricultural Bank v. Pallen*, 8 Smedes & M. 357; 47 Am. Dec. 92.

<sup>2</sup> *Hayden v. Goppinger*, 67 Iowa, 106; *Rittspangh v. Lewis*, 103 Pa. St. 1.

<sup>3</sup> *Cockey v. Milne*, 16 Md. 200; *Tyrrell v. Roundtree*, 7 Pet. 464; *Hannah v. Felt*, 15 Iowa, 141; *Porter v. Pico*, 55 Cal. 165; *Lackey v. Siebert*, 23 Mo. 85; *Langdon v. Raiford*, 20 Ala. 532; *McLellan v. Solomon*, 23 Fla. 437; 11 Am. St. Rep. 381; note to *Franklin Bank v. Bachelder*, 39 Am. Dec. 607.

<sup>4</sup> *Jones v. Wright*, 60 Ga. 384.

a right to insist upon a sale in order to learn whether the net proceeds of the sale will reach them, and then to seek satisfaction otherwise if it does not. On the same principle the expense of an audit in distributing the fund is always paid out of the fund, whether the lien on which the sale was had is reached by the proceeds or not."<sup>1</sup> "The lien, if not an effect of the judgment, is inseparably connected with it. And this is the case, whether the lien was created by the judgment and execution or by statute. And in either case, where the right has attached in the courts of the United States, a state has no power, by legislation or otherwise, to modify or impair it." Therefore a state law, passed after the rendition of a judgment in a United States court, requiring judgments to be recorded in a particular way, in order to make them a lien, does not impair or affect the lien of such existing judgment, though it be not recorded.<sup>2</sup>

§ 339. **Creation of the Lien.** — "At common law, except for debts due the king, the lands of the debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. This was in accordance with the policy of the feudal law introduced into England after the Conquest, which did not permit the feudatory to charge or to be deprived of his lands for his debts, lest thereby he should be disabled from performing his stipulated military service, and which, moreover, forbid the alienation of a feud without the lord's consent. The goods and chattels of the debtor therefore, and the annual profits of his lands as they arose, were the only funds allotted to the payment of his debts."<sup>3</sup>

The statutes of the several states of this Union generally declare that judgments shall be liens for some specified period of time, from the date either of their docketing or of their rendition. But the lien undoubtedly

<sup>1</sup> *Shelly's Appeal*, 38 Pa. St. 210.      <sup>2</sup> *Hutcheson v. Grubbs*, 80 Va. 254;  
See also *McNeil v. Bean*, 32 Vt. 429.      *Witmer's Appeal*, 45 Pa. St. 455; 84  
<sup>3</sup> *Massingill v. Downs*, 7 How. 760.      *Am. Dec.* 505.

existed by virtue of certain English statutes so anciently adopted as to be regarded as part of our common law, and also by virtue of other English statutes subjecting to execution lands situate in the colonies. "We find it laid down by compilers and by commentators on the law of England that the lien of judgments upon lands in that country was created by the *statute de mercatoribus*, also styled the Statute of Acton Burnell, 11 Edward I., and by the Statute of Westminster, 2, 13 Edward I., c. 18, by the latter of which statutes the writ of *elegit* was given by enacting that 'he who recovereth in debt or damages may have either a *fieri facias* on the chattels of the debtor, or a writ on which the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen, and beasts of the plow, and half of his land, till the debt be levied upon a reasonable price or extent.'"<sup>1</sup>

In 3 Bacon's Abridgment, tit. Execution, D, p. 392, the law is thus stated: "When the plaintiff has judgment, he has his election to sue out what execution he pleases, but he cannot regularly take out two different executions on the same judgment, nor a second of the same nature, unless upon failure of satisfaction out of the first. Therefore if the plaintiff, upon a judgment or recognizance at common law, sues out an *elegit*, he can have no *capias ad satisfaciendum* afterward to take the body, because he hath determined his choice, by that writ, to the goods and chattels and a moiety of the land, which having been entered upon record, he is thereby estopped, and though he takes but an acre of land in execution, yet it is held a satisfaction of the debt, be it never so great, because in time it may come out. The exceptions to this restriction of the plaintiff's right to another execution are the return of *nihil* on the first, and the return of the sheriff that he hath levied only on the goods of the defendant; because plaintiff, being entitled to levy on the land also, should not be precluded from the benefit conferred by

<sup>1</sup> Bac. Abr., tit. Execution.

the statute. But if the land be delivered, though of never so little value, that will be a bar, if the sheriff hath delivered a moiety of the land according to the statute."<sup>1</sup>

In Virginia,<sup>2</sup> Maryland, and Mississippi, in the absence of any statute, in direct terms, giving them that effect, judgments were treated as liens upon real estate as the necessary result of the various English and colonial statutes subjecting lands to execution. "This judgment lien is a uniform consequence of the real estate being liable to be taken and extended under an execution upon such judgment. Whenever, then, such a liability exists, the lien arises as the constant incident of such a judgment; and where the property cannot be taken in execution, there is no lien."<sup>3</sup> The lien was inseparably associated with the right to take out an *elegit*. If this right was suspended, the land was free from the lien during such suspension. If the right to take out an *elegit* continued, though a *feri facias* had already issued and was still out, the lien continued, though a levy had been made under the *feri facias*.<sup>4</sup>

A statute enacted by the legislature of the state of Texas provided that whenever final judgment *shall be* rendered in any court of record, said judgment shall become a lien, etc. The words "shall be" were, by a majority of the court, construed as equivalent to shall have been; and the act was therefore given a retroactive operation, so far as to make judgments entered prior to its passage liens upon the defendant's real estate, taking effect contemporaneously with the act itself.<sup>5</sup>

<sup>1</sup> *Snead v. McCoull*, 12 How. 407.

<sup>2</sup> *Borst v. Nalle*, 28 Gratt. 423; *Price v. Thrash*, 30 Gratt. 515; *Hutcheson v. Grubbs*, 80 Va. 254.

<sup>3</sup> *Coombs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236. See also, in relation to the creation of the lien by early English and colonial statutes, and its inseparable connection with the right to issue the *elegit*, the case just cited, and *Rankin v. Scott*, 12 Wheat. 177; *Scriba v. Deanes*, 1 Brock. 166; *Bank of United States v. Winston's Ex'r*, 2

*Brock*. 252; *Burton v. Smith*, 13 Pet. 464; *Shrew v. Jones*, 2 McLean, 78; *Davidson v. Myers*, 24 Md. 555; *Renick v. Ladington*, 14 W. Va. 367; *Borst v. Nalle*, 28 Gratt. 423; *Taylor's Adm'r v. Spindle*, 2 Gratt. 44.

<sup>4</sup> *Massingill v. Downs*, 7 How. 760; *United States v. Morrison*, 4 Pet. 124; *Taylor v. Thomson*, 5 Pet. 358; *Burton v. Smith*, 13 Pet. 464.

<sup>5</sup> *Moore v. Letchford*, 35 Tex. 185; 14 Am. Rep. 363; *Gardner v. Spivey*, 35 Tex. 508.

In harmony with the general rule that a lien does not exist except in consequence of the right to execution for a definite amount to be made out of the real property of the judgment debtor, a judgment upon the foreclosure of a mortgage does not become a lien upon any property not embraced in the mortgage until a sale has been made, the deficiency ascertained, and a judgment entered or docketed therefor.<sup>1</sup>

As heretofore stated, the lien of a judgment is a consequence of the right to sell real property for its satisfaction, and whenever that right is conceded, the existence of the lien is generally admitted, and whenever that right is denied, the existence of the lien is also denied. Decrees for a definite sum of money, and capable of being enforced by execution, are therefore liens upon real estate;<sup>2</sup> while judgments upon which the right to issue execution has terminated cease to be liens.<sup>3</sup> So while judgment liens are recognized and often enforced in equity, it will not respect nor enforce them if they have ceased to be enforceable at law.<sup>4</sup>

§ 340. **Judgment must be Final and Definite.**— Because the lien of a judgment is inseparably associated with an *elegit* or with the right to take lands in execution, it follows that there can be no lien except upon such judgments as the plaintiff is entitled to satisfy by levy upon the lands of the debtor. Ordinarily, plaintiff is not entitled to a writ of execution until a final judgment is pronounced. Hence the general rule that before a judgment can create a lien it must be final.<sup>5</sup> A judgment by default which is interlocutory in its nature, and which cannot become

<sup>1</sup> Hibberd v. Smith, 50 Cal. 511; Linn v. Patton, 10 W. Va. 187.

<sup>2</sup> Scriba v. Deanes, 1 Brock. 166; Blake v. Heyward, 1 Bail. Eq. 208; Meyers v. Hewitt, 16 Ohio, 449; Hamburger v. Easter, 57 Ga. 71; Linn v. Patton, 10 W. Va. 187.

<sup>3</sup> Ashton v. Slater, 19 Minn. 347; Noble v. Collum, 44 Ala. 554; Barclay v. Plant, 50 Ala. 509.

<sup>4</sup> Mower v. Kip, 6 Paige, 88; 29 Am. Dec. 748; Buchan v. Sumner, 2 Barb. Ch. 165; 47 Am. Dec. 305; Lawson v. Jordan, 19 Ark. 297; 70 Am. Dec. 596; Hutcheson v. Grubbs, 80 Va. 251; Werdenbaugh v. Reid, 20 W. Va. 588; Ray v. Thompson, 43 Ala. 434; 94 Am. Dec. 696.

<sup>5</sup> Hays v. Tryon, 2 Miles, 208; Davidson v. Myers, 24 Md. 538.

final until the amount is ascertained, is of itself no lien, nor will the lien of the final judgment, when entered thereon, relate back to the entry of interlocutory judgment.<sup>1</sup> The judgment must be for a specified sum. If it be that "plaintiff do recover judgment as prayed for";<sup>2</sup> or that he pay out an estate, when collected, to certain general legatees, after retaining a certain sum in his hands to pay counsel fees and allowance to himself;<sup>3</sup> or that an execution issue for any deficiency which may exist after selling certain designated property;<sup>4</sup> or if it be a judgment by confession for a sum to be ascertained by the prothonotary,<sup>5</sup>—in all these cases there can be no judgment lien until the amount of the recovery is fixed and made certain. If, however, there is judgment for want of a plea, and the damages have not been assessed, it has been held to constitute a lien from the date of its entry, if the amount of the damages recoverable may be ascertained by computation from an inspection of the pleadings. This decision is founded upon the rule that a judgment by default is final, and not interlocutory, "when the sum is certain, or can be made so by mere calculation."<sup>6</sup> If a judgment is not entered, or if entered its entry is so defective that the amount recovered cannot be ascertained therefrom, and an order is afterwards made directing the entry of judgment *nunc pro tunc*, the judgment when so entered will not be treated as a lien prior to the date of its actual entry, as against *bona fide* purchasers or encumbrancers from or under the judgment debtor.<sup>7</sup>

§ 341. Includes Interest, Damages, and Costs.—The lien of a judgment includes all amounts for which execution may properly issue. In the absence of any statutory provision, interest could be recovered only by an action

<sup>1</sup> Davidson v. Myers, 24 Md. 538;  
De Saussure v. Zeigler, 6 S. C. 12.

<sup>2</sup> Lirette v. Carrane, 27 La. Ann. 298.

<sup>3</sup> Hamburger v. Easter, 57 Ga. 71.

<sup>4</sup> Eames v. Germania Turn Verein, 74 Ill. 54; Linn v. Patton, 10 W. Va. 187.

<sup>5</sup> Philadelphia Bank v. Craft, 16 Serg. & R. 347.

<sup>6</sup> Sellers v. Burk, 47 Pa. St. 344;  
Watkins v. Phillips, 2 Whart. 209.

<sup>7</sup> Miller v. Wolf, 63 Iowa, 233; Lea v. Yeates, 40 Ga. 56.

on the judgment, and was therefore no lien until it merged into the second judgment. But in all cases where the statute has provided for the collection of interest by execution, it is as much a lien as the principal sum recovered.<sup>1</sup> Where, after the affirmance of a judgment upon appeal, it is the practice to certify the costs and damages of such appeal to the trial court and to include them in any execution issued upon the original judgment, they have been held to be, in contemplation of law, a part of the original judgment, and therefore to constitute a lien on any lands of the defendant alienated after its entry.<sup>2</sup>

§ 342. **Lien is Controlled by Law.**—The lien of a judgment or decree is regulated by law, and cannot be restrained or extended by the court so as to take effect upon particular real estate.<sup>3</sup> Its general nature cannot be made special. “While courts of law have generally the power to revoke, correct, or quash their own process in the course of their ordinary jurisdiction, there is a manifest impropriety in a court of law undertaking to grant relief on the ground of equities existing outside of the process in favor of one not a party to the suit.”<sup>4</sup> The character of the cause of action does not affect the nature of the lien. Therefore a judgment for purchase-money has no lien superior to that of a judgment on any other cause of action.<sup>5</sup>

The character, extent, and duration of judgment liens are dependent upon the express will of the legislature. Neither the courts nor the parties are regarded as having power to extend them;<sup>6</sup> but the right to have a judgment operate as a lien, or to have property held free from its

<sup>1</sup> *Mower v. Kip*, 2 Edw. Ch. 165; *Winalow v. Ancrum*, 1 McCord Eq. 105; *Clonts v. Ritch*, 12 Fla. 633; 95 Am. Dec. 345.

*Sims v. Campbell*, 1 McCord Eq. 53; <sup>2</sup> *Fisher v. Foote*, 25 Tex. Supp. 311.

16 Am. Dec. 595. <sup>3</sup> *Houston v. Houston*, 67 Ind. 276; *Lanning v. Carpenter*, 48 N. Y. 34 Am. Dec. 739. See post, sec. 345.

<sup>4</sup> *Castro v. Illies*, 13 Tex. 229.

<sup>5</sup> *Ley v. Edwards*, 21 Fla. 333.



lien, is not a vested right, and the legislature may therefore create a judgment lien, where it did not before exist, or destroy such lien at its pleasure. Where no statute has been enacted making judgments liens, they must be denied effect as such.<sup>1</sup> When, on the other hand, such a statute is passed, it may be made applicable to pre-existing judgments as well as to those subsequently rendered;<sup>2</sup> and it may subsequently be repealed or amended, and the lien destroyed, or its duration shortened,<sup>3</sup> or its continuance made to depend upon the docketing of the judgment, or the filing of a transcript, or the doing of some other act not required to be done when the lien first came into being.<sup>4</sup>

§ 343. **Docketing.** — "The dogget, or as it is commonly called, the docket or docquet, is an index to the judgment, invented by courts for their own ease and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The practice of docketing judgments seems to have obtained as early as the reign of Henry the Eighth, in the court of common pleas, where the dockets are entered on a separate roll, called the docket roll or common docket, which is of so high an authority as to even warrant an amendment of the judgment itself. But in the king's bench the docket was originally nothing more than a note on parchment or paper, containing the christian and surname of plaintiff and defendant, the debt and damages recovered, with the term and number of the judgment roll."<sup>5</sup> While judgments are for other purposes valid as soon as rendered, they do not become liens upon real estate, at least against subsequent purchasers with-

<sup>1</sup> Walker v. Elledge, 65 Ala. 51; Carlisle v. Goodwin, 68 Ala. 137; Mitchell v. Wood, 47 Miss. 231; Grove's Appeal, 68 Pa. St. 143.

<sup>2</sup> Moore v. Letchford, 35 Tex. 185; 14 Am. Rep. 363; Moore v. Holland, 16 S. C. 15; Woodson v. Collins, 56 Tex. 168.

<sup>3</sup> Houston v. Houston, 67 Ind. 276;

Gimbel v. Stolte, 59 Ind. 446; Henry v. Henry, 31 S. C. 1; McCormick v. Alexander, 2 Ohio, 65. *Contra*, apparently, King v. Belcher, 30 S. C. 381.

<sup>4</sup> Tarpley v. Hamer, 9 Smedes & M. 310; Whitehead v. Latham, 83 N. C. 232.

<sup>5</sup> Tidd's Practice, 939.

out notice, until docketed.<sup>1</sup> Nor is the docketing effective unless authorized. If the judgment cannot be enforced until entered in the judgment-book, its docketing prior to such entry is unwarranted, and creates no lien.<sup>2</sup> Generally, though perhaps not universally, the statutes of the different states governing the liens of judgments entered therein either require them to be docketed or a transcript thereof to be filed in some public office, or the doing of some equivalent act calculated to notify intending purchasers and encumbrancers from or under the defendant of the rendition of the judgment against him and of the amount thereof. When the statute is substantially complied with, all persons must take notice of the judgment; and any interest thereafter acquired by them from the defendant, whether by his voluntary act or under compulsion of law, is subordinate to the judgment lien and liable to be extinguished by proceedings taken for its satisfaction.<sup>3</sup> In Virginia and West Virginia, an undocketed judgment is a lien as against every person except a purchaser of real estate for value without notice;<sup>4</sup> and if two judgments remain undocketed for a number of years, after which the one last recovered is first docketed, the one first recovered nevertheless retains precedence, and is a lien upon lands of the debtor remaining unalienated when it was docketed.<sup>5</sup> In perhaps a majority of the states, however, judgments as against one another rank as liens from the dates of the respective docketings, and therefore a sale under the one first docketed vests title in the purchaser free of prior judgments more recently docketed;<sup>6</sup>

<sup>1</sup> *Foster v. Chapman*, 4 McCord, 291; *Close v. Close*, 28 N. J. Eq. 472. In some of the states it seems clear that a judgment is a lien as against the defendants and all persons having notice thereof, whether docketed or not: *Renick v. Ludington*, 14 W. Va. 367.

<sup>2</sup> *Rockwood v. Davenport*, 37 Minn. 533; 5 Am. St. Rep. 872.

<sup>3</sup> *Andrews v. Doe*, 6 How. (Miss.) 554; 38 Am. Dec. 450; *Gordon v. Rixey*, 76 Va. 694; *Leake v. Ferguson*, 2 Gratt. 420; *Redd v. Ramey*, 31 Gratt. 265.

<sup>4</sup> *Gordon v. Rixey*, 76 Va. 694; *Duncan v. Custard*, 24 W. Va. 730; *Gurnee v. Johnston's Adm'r*, 77 Va. 712.

<sup>5</sup> *Anderson v. Nagle*, 12 W. Va. 98; *Gurnee v. Johnston's Adm'r*, 77 Va. 712.

<sup>6</sup> *Mann's Appeal*, 1 Pa. St. 24. In Canada, judgments are not docketed. They may be registered, and from the registry thereof may become liens: *Bank v. Thompson*, 9 Grant (U. C.) 51; *Doe v. Boulton*, 9 U. C. Q. B. 532.

or if the property is sold and its proceeds are to be distributed, judgments must be paid in the order of their docketing, irrespective of the dates of their rendition.<sup>1</sup>

While the duty of docketing judgments is imposed upon the clerk of the court or some other officer, the protection of the plaintiff's interests requires him to see that this duty is properly performed. If there are *bona fide* purchasers or encumbrancers before the proper docket entries are made, their rights are paramount to the plaintiff's lien.<sup>2</sup> They are not bound to examine for judgment liens further than to look into the proper dockets. If the clerk or prothonotary fails to make the proper entries in his dockets, the only remedy of an aggrieved judgment creditor is by action against the officer.<sup>3</sup>

In West Virginia a debtor conveyed part of his lands to innocent purchasers for value, at a time when there were two judgments against him, the junior of which was docketed, and the senior undocketed. It was held, in a contest between these purchasers and creditors of the judgment debtor, that the liens of the undocketed judgments must be satisfied out of the unsold lands, though this might result in requiring the holders of the docketed judgments to collect them wholly out of the lands so conveyed.<sup>4</sup>

§ 344. **Correcting Docketing.** — If, by mistake, a judgment is docketed for too small a sum, the docketing may, on motion, be corrected; but not to affect the rights of purchasers and encumbrancers acquired prior to the correction.<sup>5</sup>

§ 345. **Judgment in Appellate Court.** — If, on appeal, the judgment of the inferior court is affirmed, with costs

<sup>1</sup> *Puryear v. Taylor*, 12 Gratt. 401.      *Landon v. Ferguson*, 3 Russ. 349;  
<sup>2</sup> *Bell v. Davis*, 75 Ind. 314; *Johnson*      *Braithwaite v. Watts*, 2 Crompt. & J.  
*v. Exchange Bank*, 33 Gratt. 473.      318; *Brandling v. Plummer*, 26 L. J.,  
<sup>3</sup> *Ridgway & Co.'s Appeal*, 15 Pa.      N. S., 326; *Holman v. Miller*, 103  
St. 177; 53 Am. Dec. 586; *Woods v.*      N. C. 118.  
*Reynolds*, 7 Watts & S. 406; *Hance's*      <sup>4</sup> *Renick v. Ludington*, 14 W. Va.  
*Appeal*, 1 Pa. St. 408; *Buchan v. Sum-*      367.  
*ner*, 2 Barb. Ch. 165; 47 Am. Dec. 305;      <sup>5</sup> *Hunt v. Grant*, 19 Wend. 90.

or damages, these costs and damages do not constitute a lien until docketed in the lower court. If it were otherwise, purchasers could never ascertain what burdens were imposed upon real estate by judgments until the last moments during which appellate authority can be exercised had elapsed.<sup>1</sup>

§ 346. **Justices' Judgments.**—In California, justices of the peace are not authorized to keep a lien docket. They have, it is true, a book which is called a docket. The purpose of this book is to preserve a written memorial of the acts of the justices and of the proceedings had and the judgments entered by and before them. Justices' dockets cannot be employed to create liens. Their judgments become liens when transcripts, or abstracts thereof, certified by the justice, are filed in the office of the county recorder. This transcript must formerly have been a *copy* of the judgment. If it was in form similar to the docket entries required to be made in the dockets kept by the county clerk of judgments in the district court, it was unauthorized by law, and created no lien.<sup>2</sup> But now an abstract may be made and filed instead of a transcript.<sup>3</sup>

§ 347. **Irregularities in Docketing.**—As the object of requiring a docket to be kept is to enable intending purchasers and encumbrancers to ascertain whether any judgment lien exists against property in which they contemplate investing, the names of each judgment debtor must be so written in the docket as to identify him and inform those who read the entry that his property is subject to the lien. Therefore it is not sufficient to docket the judgment against some of the defendants, or to describe it as being against A, B, and others. If so docketed, the lien must be limited to the property of the defendants who are properly named.<sup>4</sup> It would undoubtedly be safer

<sup>1</sup> *Daniels v. Winalow*, 4 Minn. 318;

*Chapin v. Broder*, 16 Cal. 403; *Alsop*

*v. Moseley*, 104 N. O. 60. *Contra*,

*McClung v. Beirne*, 10 Leigh, 394; 34

Am. Dec. 739.

<sup>2</sup> *Bagley v. Ward*, 27 Cal. 369.

<sup>3</sup> Code Civ. Proc., secs. 897-900.

<sup>4</sup> *Cummings v. Long*, 16 Iowa, 41;

85 Am. Dec. 502.

to write the name of each defendant in full, though this is not indispensable. How much of the name may be safely omitted it is difficult to state. It will not do to enter a defendant's surname only.<sup>1</sup> And it has been held that the omission of the middle name or the middle initial of the defendant's name was fatal.<sup>2</sup> This decision is not likely to receive general acquiescence,<sup>3</sup> though it may perhaps be proper when the omission of such letter was, under the circumstances, likely to give the impression that the judgment was against another person. If a middle initial is used, it must be the right one, and therefore a docketing against W. G. Black creates no lien against the lands of William A. Black.<sup>4</sup> We assume that if the name entered in the docket is that by which the defendant is commonly known, this is sufficient. Hence a docketing against "A. Jones" will charge the lands of "Abel Jones," if he uniformly writes his christian name with the initial only, and there is no other "A. Jones" in the same county.<sup>5</sup> A docketing against William Mankedick does not create a lien against lands which were conveyed to defendant by the name of H. W. Mankedick, his full baptismal name being Henry William Mankedick.<sup>6</sup>

The proper spelling of his name is not essential to a sufficient docketing against the defendant. All that the law demands in this respect is, that the pronunciation of the name written by the clerk shall correspond with that of the name of the person whose realty is sought to be charged. "Identity of sound is a surer designation of the names of persons than identity of orthography."<sup>7</sup> Therefore a docketing against Henry Hickman creates a lien against the lands of Henry Heckman.<sup>8</sup> This rule is

<sup>1</sup> *Ridgway & Co.'s Appeal*, 15 Pa. St. 177; 53 Am. Dec. 586.

<sup>2</sup> *Wood v. Reynolda*, 7 Watts & S. 406.

<sup>3</sup> *Clute v. Emmerick*, 26 Hun, 10; *Johnson v. Hess*, 126 Ind. 312.

<sup>4</sup> *Hutchinson's Appeal*, 92 Pa. St. 186.

<sup>5</sup> *Jones's Estate*, 27 Pa. St. 336.

<sup>6</sup> *Johnson v. Hess*, 126 Ind. 298. In this case the court intimated that a docketing against Henry Mankedick would have been sufficient.

<sup>7</sup> *Myer v. Fegaly*, 39 Pa. St. 429; on authority of 2 *Strange*, 889; 2 *Taunt.* 401; 2 *Caines*, 362; *Petrie v. Woodworth*, 3 *Caines*, 219.

<sup>8</sup> *Bergman's Appeal*, 88 Pa. St. 120.

so liberally applied that though the name as spelled on the docket would ordinarily be pronounced differently from the name of the defendant, yet if, according to the prevailing usage in that part of the country, the two names would be similarly spoken by its inhabitants, the docketing will create a lien. Thus where, in a portion of the state of Pennsylvania, "Bubb" was commonly pronounced like Bobb, the entry and docketing of a judgment against "John Bobb" was held to charge purchasers under "John Bubb" with notice. "In examining titles, the searchers must take notice of the different ways of spelling the same name. But if the spelling is so entirely unusual that one would not be expected to think of it, then it would not impart notice."<sup>1</sup> But an exception to the rule making a docketing preserving the identity of sound sufficient exists when, though the identity of sound is still respected, the name is indexed under the wrong initial. Thus while "Yoest" and "Joest" are pronounced alike in the German, searchers for judgment encumbrances against "Yoest" are not bound to consult the indices under the letter "J." Nor is the searcher required to know how the name he is examining may be spelled according to the rules applicable to foreign languages; and to ascertain whether some entry in the docket may, if pronounced under those rules, represent the name of the owner of the real estate he is searching. "The docket must be kept in our own language."<sup>2</sup>

The question whether two names, though very similar in their spelling, have such identity of sound that a docketing against one is sufficient against the other is one the answer to which cannot always be foretold. Thus it has been held that Burkhead and Bankhead,<sup>3</sup> J. H. Hesse and J. H. Hesser,<sup>4</sup> and Helen Desney and Ellen Desney,<sup>5</sup> are different names, and that a docketing

<sup>1</sup> *Myer v. Fegaly*, 39 Pa. St. 429.

<sup>2</sup> *Heil and Lauer's Appeal*, 40 Pa. St. 453; 80 Am. Dec. 590; *Buchan v. Sumner*, 2 Barb. Ch. 167; 47 Am. Dec. 305.

<sup>3</sup> *Anthony v. Taylor*, 68 Tex. 403.

<sup>4</sup> *Ætna L. I. Co. v. Hesser*, 77 Iowa, 381; 14 Am. St. Rep. 297.

<sup>5</sup> *Thomas v. Desney*, 57 Iowa, 58.

against one is ineffective against the other. The addition of "junior," being no part of a man's name, is not essential to a docketing against a son, though his father has the same name and resides in the same county.<sup>1</sup> Under a law requiring that the docket "particularly state and set forth the names of the parties," an entry of the firm name of the defendants, without their christian names, creates no lien.<sup>2</sup> The entry under the letter "G" of "Green, Wilson, and Mitchell," no christian name being shown, imparts "no notice, and affects neither subsequent purchasers nor judgment creditors."<sup>3</sup> The supreme court of California dissents from the decisions just cited. Under a statute of that state requiring the names of defendants to be entered in the docket in alphabetical order, the question arose whether a judgment docketed against "Chipman and Aughinbaugh" created a lien against the lands of W. W. Chipman. The court thus answered this question: "It was evidently intended that the surnames should precede the christian names, and the omission of the christian name of the defendant Chipman did not deprive the docket of the useful function of directing the attention of those interested to the existence of the judgment, and to all its incidents."<sup>4</sup> If this statement on the part of the court regarding the effect of the omission of the christian name of the defendant be understood as a statement of an actual fact, then the decision is free from objection; but viewed as a conclusion of law drawn from the other facts, we think it very questionable. We do not doubt the wisdom of those decisions which declare that a substantial compliance with the provisions of the statute is all that ought to be exacted;<sup>5</sup> but subsequent purchasers and encumbrancers ought not to be sacrificed to the indolence, inattention, or incapacity of those whose duty it is to docket the judg-

<sup>1</sup> Bidwell v. Coleman, 11 Minn. 78; Hamilton's Appeal, 103 Pa. St. 368; Smith's Appeal, 47 Pa. St. 128.

<sup>2</sup> York Bank's Appeal, 36 Pa. St. 458.

<sup>3</sup> Ridgway & Co.'s Appeal, 15 Pa. St. 177; 53 Am. Dec. 586.

<sup>4</sup> Hibberd v. Smith, 50 Cal. 511.

<sup>5</sup> Hesse v. Mann, 40 Wis. 560.

ments of the court. The docket ought, at least, to be a fair index to the names of the judgment debtors; and this it can never be if it does not contain a reference to the christian as well as to the surnames,—something to distinguish the particular Brown or Smith whose realty is sought to be charged from the many other persons bearing the same name. Though the defendants are partners, a judgment against them ought to be entered in proper places in the docket against each of their names. Hence if a judgment against A and B is docketed under the letter “A” alone, it is not sufficient to charge purchasers from B, though in the docketing against A the judgment is properly described as being against both A and B.<sup>1</sup> So, too, the entries ought to be made in the book in common use at the time; and if entered so far out of their order that they would probably escape the attention of a reasonably diligent searcher, the docketing ought to be adjudged insufficient. It must, however, be admitted that our views in this respect are not in harmony with some of the decisions.<sup>2</sup>

The statutes of a state may require that dockets showing judgment liens, or abstracts or transcripts of judgments filed in some public office for the purpose of creating liens, be indexed, and then the question may arise whether an omission to index or an imperfect indexing is fatal to the lien. In West Virginia<sup>3</sup> and Virginia, after much consideration, it has been determined that the *indexing* is not essential to the creation of a docket lien.<sup>4</sup> The decision was placed upon the ground that in those states the docket and its index were separate and distinct; and that the judgment creditor, by procuring the entry or record of his judgment in the docket, fully complied with all which the statute required of him, and upon the further general ground that an index is not an

<sup>1</sup> Hughes v. Lacock, 63 Miss. 112.

<sup>2</sup> Hesse v. Mann, 40 Wis. 560.

<sup>3</sup> Caldwell v. Prindell, 19 W. Va. 604.

<sup>4</sup> Old Dominion Granite Co. v. Clarke, 28 Gratt. 617.



essential part of a record. In the majority of the states, the proper indexing of the defendant's name, or its entry under the proper letter in the docket, is indispensable to the creation of a lien against a purchaser or encumbrancer in good faith without notice.<sup>1</sup> In a state where the law requires the keeping of a judgment record containing the names of judgment creditors and judgment debtors alphabetically arranged, it was held that the failure to re-enter the names on the general index did not impair the lien of the judgment, for the reason that the entry in the judgment record was sufficient to give constructive notice of the judgment and its lien.<sup>2</sup> The docketing of a judgment is a ministerial act, and may be effectively performed on a non-judicial day.<sup>3</sup>

It has been held that the docket must be so far perfect as to contain within itself everything required by the statute; that it cannot be aided by reference to the judgment or prior proceedings; and therefore that the use of numerals, without anything to show whether they represent dollars, is fatal.<sup>4</sup> This is very questionable. We judge the better rule to be that thus stated: "A subsequent purchaser, however, is affected with such notice as the index entries afford; and if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril."<sup>5</sup> A judgment against defendant by a wrong name, being valid against him, may be properly docketed by entering the correct name, and showing also the title of the cause as it stood with the wrong name.<sup>6</sup> Generally, the failure to docket a judgment, or a mistake or omission made in attempting to docket it, does not wholly destroy its effect as a lien,

<sup>1</sup> *Metz v. State Bank*, 7 Neb. 165; *Sterling M. Co. v. Early*, 69 Iowa, 94; *Nye v. Moody*, 70 Tex. 434; *Aetna L. I. Co. v. Hesser*, 77 Iowa, 381; 14 Am. St. Rep. 297.

<sup>2</sup> *Hamilton v. Whitney*, 19 Neb. 303.

<sup>3</sup> *In re Worthington*, 7 Biss. 455; 16 Bank. Reg. 52.

<sup>4</sup> *In re Boyd*, 4 Saw. 262; 16 Bank. Reg. 137.

<sup>5</sup> *Metz v. State Bank*, 7 Neb. 172.

<sup>6</sup> *Beavan v. Countess of Oxford*, 3 Smale & G. 11.

but merely makes the lien inoperative as against *bona fide* purchasers and encumbrancers having no actual or constructive notice of the judgment.<sup>1</sup>

PART II.—ESTATES AND INTERESTS AFFECTED BY THE LIEN.

§ 348. **Equitable Interests.**—At common law a judgment lien did not attach to a mere equity,<sup>2</sup> though the equity was accompanied by possession.<sup>3</sup> This rule of the common law prevails in several of the United States,<sup>4</sup> and is generally applied, in the absence of any statute undoubtedly creating a different rule. Thus though a statute provided that a judgment should “be a lien on all real property of the judgment debtor, not exempt from execution, owned by him in the county at the time of docketing,” it was held not to make a judgment a lien on the equitable title of the defendant.<sup>5</sup> In Indiana, one who has purchased land, but has not received a conveyance, has no interest subject to a judgment lien;<sup>6</sup> but if land is held in trust for his benefit, the rule is otherwise.<sup>7</sup> This common-law rule has been abolished in England. Judgments in that country are liens on “all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary nature) of or to which such person shall, at the time of entering such judgment, or at any time afterward, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, re-

<sup>1</sup> *Cushing v. Edwards*, 68 Iowa, 145; *Fuller v. Nelson*, 35 Minn. 213; *Bachan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 305.

<sup>2</sup> *Jackson v. Chapin*, 5 Cow. 485; *Russell v. Houston*, 5 Ind. 180; *Jeffries v. Sherburn*, 21 Ind. 112; *Morsell v. First N. B.*, 3 Cent. L. J. 433; 91 U. S. 357; *Coombs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236; *Dixon v. Dixon*, 81 N. C. 323.

<sup>3</sup> *Van Cleve v. Groves*, 4 N.J. Eq. 330.

<sup>4</sup> *Powell v. Knox*, 16 Ala. 364.

<sup>5</sup> *Smith v. Ingles*, 2 Or. 43; *Bloom-*

*field v. Humason*, 11 Or. 229; *Nessler v. Neher*, 18 Neb. 649; *Trimble v. Hunter*, 104 N. C. 129; *Brandies v. Cochrane*, 112 U. S. 344; *McFerran v. Davis*, 70 Ga. 661; *Beckett v. Dean*, 57 Miss. 232; *Dixon v. Dixon*, 81 N. C. 323; *Terrell v. Prestel*, 68 Ind. 86; *Baird v. Kirtland*, 8 Ohio, 21; *Cook v. Dillon*, 9 Iowa, 407; 74 Am. Dec. 354; *Trask v. Green*, 9 Mich. 358; *Freedman's S. Co. v. Earle*, 110 U. S. 710; *Chautauque Co. Bank v. White*, 6 N. Y. 236; 57 Am. Dec. 442.

<sup>6</sup> *Evans v. Feeny*, 81 Ind. 532.

<sup>7</sup> *Maxwell v. Vaught*, 96 Ind. 136.

mainder, or expectancy, or over which such person shall, at the time of entering such judgment, or at any time afterwards, have any disposing power which he might, without the assent of another, exercise for his own benefit."<sup>1</sup> Laws having substantially the same effect as the provisions just quoted from the English statute are in force in a majority of the states of the American Union. Equitable estates, while not subject to any judgment lien which could be recognized and enforced at law, were, in equity, as much bound by such lien as legal estates were.<sup>2</sup>

In Pennsylvania, on account of the want of a court of chancery, the courts were from necessity obliged to treat all judgments as having an immediate operation upon equitable as well as upon legal estates. Therefore a party who, in that state, purchased land, paying a portion of the purchase-money and taking possession, but who has not received any conveyance, has an estate to which a judgment lien may attach.<sup>3</sup> Where the vendor held the right to obtain title on certain terms from the state, the land was held to be bound by a judgment lien, though not the vendor, but the vendee, complied with the terms and obtained the patent.<sup>4</sup> In the same state several legatees agreed to take land instead of the money which would arise from the land if it were sold. It was held that a judgment against one of them, rendered after such agreement, bound his share as soon as it was set apart to him.<sup>5</sup>

The general tendency of the American statutes creating and regulating judgment liens is to make such liens a charge upon whatever estate the judgment debtor may have, irrespective of the question whether his title is legal or equitable, perfect or inchoate. A judgment lien may therefore attach to lands purchased of the government,

<sup>1</sup> 1 & 2 Vict., c. 110, sec. 13.

<sup>2</sup> *Michaux's Adm'r v. Brown*, 10 Gratt. 612; *Haleys v. Williams*, 1 Leigh, 140; 19 Am. Dec. 743; *Lee v. Stone*, 5 Gill & J. 1; 23 Am. Dec. 559.

<sup>3</sup> *Auwerter v. Mathiot*, 9 Serg. & R. 397; *Russell's Appeal*, 15 Pa. St. 319.  
<sup>4</sup> *Carkhuff v. Anderson*, 3 Binn. 4.  
<sup>5</sup> *Brownfield v. Mackey*, 27 Pa. St. 320.

but for which no patent has issued,<sup>1</sup> though it does not attach to a mere right of pre-emption.<sup>2</sup> The interest which is subject to the lien must be an interest in the land itself.<sup>3</sup> Hence a devise to children, but giving their father the right to live on the land during his life, confers no estate on the father which can be subject to a judgment lien.<sup>4</sup> An easement consisting of a right of way with such an occupancy as is necessary to give this right effect is not subject to judgment liens.<sup>5</sup> Where lands are devised to an executor, with absolute power to sell them and to divide their proceeds among certain heirs, and the latter have the right, by some decisive act, to elect to take the land in lieu of the money, such election will vest in them an equitable title subject to execution, in Pennsylvania; "but until the act of election the heirs have no estate or title which would be the proper subject of a lien by judgment or by mortgage, or which could be taken in execution."<sup>6</sup>

§ 349. **Equity of Redemption.**—An equity of redemption in real estate is subject to the lien of a judgment.<sup>7</sup> If before the sale under a decree of foreclosure a judgment is docketed against the defendant, it will be a lien on the surplus proceeds arising from the sale; but if not docketed until after the sale, it does not constitute any lien on such surplus.<sup>8</sup> After a judgment lien has attached to the inter-

<sup>1</sup> *Levi v. Thompson*, 4 How. 17; *Landes v. Brant*, 10 How. 348; *Huntingdon v. Grantland*, 33 Miss. 453; *Cavender v. Smith*, 5 Iowa, 157; *Jackson v. Williams*, 10 Ohio, 69; *Rogers v. Brent*, 5 Gilm. 573; 60 Am. Dec. 422.

<sup>2</sup> *Harrington v. Sharp*, 1 G. Greene, 131; 48 Am. Dec. 365.

<sup>3</sup> *Morrow v. Brenizer*, 2 Rawle, 185; *Thomas v. Simpson*, 3 Pa. St. 69.

<sup>4</sup> *Calhoun v. Jester*, 11 Pa. St. 474.

<sup>5</sup> *Western Pa. R. R. Co. v. Johnston*, 59 Pa. St. 294.

<sup>6</sup> *Rowland v. Miller*, 100 Pa. St. 47; *Henderson v. Henderson*, 133 Pa. St. 399; 19 Am. St. Rep. 650.

<sup>7</sup> *Bank v. Morell*, 1 McAr. 155; *Walters v. Defenbaugh*, 90 Ill. 241; *Sullivan v. Leckie*, 60 Iowa, 326; *Kin-*

*ports v. Boynton*, 120 Pa. St. 306; 6 Am. St. Rep. 706; *Julian v. Bell*, 26 Ind. 220; 89 Am. Dec. 460; *Taylor v. Cornelius*, 60 Pa. St. 187. But it is well settled in Illinois that the right of a judgment debtor to redeem his property from a forced sale thereof is a personal right which cannot be affected, impaired, or transferred to another by virtue of the lien of any judgment against the debtor; in other words, the statutory right to redeem is an interest to which the lien does not attach: *Merry v. Bostwick*, 13 Ill. 398; 54 Am. Dec. 434; *Watson v. Reissig*, 24 Ill. 281; 76 Am. Dec. 746; *Blair v. Chamblin*, 39 Ill. 521; 89 Am. Dec. 322.

<sup>8</sup> *Sweet v. Jacobs*, 6 Paige, 355; 31 Am. Dec. 525.

est of a mortgagor, he cannot destroy it by conveying to his mortgagee, and thus uniting the legal and equitable estates.<sup>1</sup> If a deed absolute on its face is given for the purpose of securing the payment of a debt, the grantor's interest is an equity of redemption, and is subject to the lien of judgments against him.<sup>2</sup> So a deed of trust made to secure the payment of money, giving the trustee power to sell in case of non-payment, and reserving the right of the grantor to redeem, will leave the grantor with an interest to which the lien of a subsequent judgment will attach. If the trustee sells in pursuance of his authority, he can convey title clear of the lien. The surplus proceeds of the sale are subject to the lien while in the hands of the trustee. But he is not bound to search the records, and therefore is relieved from all liability if, without any knowledge of the existence of any judgment, he pays over the surplus without regard to the lien.<sup>3</sup> In Illinois it is said that the surplus, after a sale by a trustee, must be distributed among the general creditors, regardless of liens.<sup>4</sup>

§ 350. **Lands Fraudulently Conveyed.** — "Whoever goes out with an execution to seek the fruits of his judgment is too apt to find that fraud has forestalled him. It then becomes his business to pursue those fruits wherever fraud has taken them; to wrest them from the possession of his adversary, wherever they may be found; and to prepare himself to show that the refuge to which they have been taken is still the refuge of fraud. In many instances the aid of equity is invoked. But generally this is unnecessary, for a transfer made to hinder, delay, or defraud creditors, while, as between the parties, it conveys the title, has, as against a creditor proceeding under execution, no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed

<sup>1</sup> *Walters v. Defenbaugh*, 90 Ill. 241.

<sup>2</sup> *Marston v. Williams*, 45 Minn.

116.

<sup>3</sup> *Cook v. Dillon*, 9 Iowa, 407; 74

Am. Dec. 354.

<sup>4</sup> *Pahlman v. Shumway*, 24 Ill. 127.

to sell it under execution. The title transferred by such sale is not a mere equity,—not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all.<sup>1</sup> And what is true of fraudulent transfers is equally true of fraudulent mortgages, liens, judgments, executions, and all similar devices for hindering, delaying, or defrauding creditors. Property held under and by virtue of a fraudulent lien, execution, or transfer is subject to execution precisely as if such transfer had not been made and such lien had not been given; and this whether it was wholly or partly fraudulent. For if, on account of fraud, it be void in part, it is at law void *in toto*.<sup>2</sup> A purchaser under a judgment rendered against the grantor subsequent to the conveyance will obtain the superior title, and will be permitted to impeach the former deed for fraud, if he was a creditor when it was made.<sup>3</sup>

The right to issue execution and to satisfy it by the sale of the defendant's real estate ordinarily implies that the judgment is a lien upon such real property. There are manifest difficulties in extending this rule to all cases where real property has been transferred to hinder or defraud creditors. In the first place, the apparent title is in the fraudulent vendee, and nothing appears of record to impugn the fairness of the transfer or to warn purchasers and encumbrancers that it remains subject to execution against the vendor. In the second place, the

<sup>1</sup> Freeman on Executions, sec. 136; Lawrence v. Lippencott, 6 N. J. L. 473; Hall v. Sands, 52 Me. 355; Gormerly v. Chapman, 51 Ga. 425; Pratt v. Wheeler, 6 Gray, 520; Austin v. Bell, 20 Johns. 442; 11 Am. Dec. 297; Lowry v. Orr, 1 Gilm. 70; Gooch's Case, 5 Coke, 60; Jacoby's Appeal, 67 Pa. St. 434; Hoffman's Appeal, 44 Pa. St. 95; Eastman v. Schettler, 13 Wis. 324; Pepper v. Carter, 11 Mo. 540; Barr v. Hatch, 3 Ohio, 527; Russell v. Dyer, 33 N. H. 186; Duvall v. Waters, 1 Bland, 569; 18 Am. Dec. 350; Middleton v. Sinclair, 5 Cranch C. C. 509; Croft v. Arthur, 3 Desaus. Eq. 223; Shears v. Rogers, 3 Barn. & Adol. 363; Staples v. Bradley, 23 Conn. 167; 60 Am. Dec. 630; Fowler v. Trebein, 16 Ohio St. 493; 91 Am. Dec. 95; Foley v. Bitter, 34 Md. 646.

<sup>2</sup> Freeman on Executions, sec. 136, and cases there cited. Henderson v. Henderson, 133 Pa. St. 399; 19 Am. St. Rep. 650.

<sup>3</sup> Eastman v. Schettler, 13 Wis. 324; Miner v. Warner, 2 Grant Cas. 448.

title in fact passes by the transfer not only as between the parties, but also as against creditors who do not assail the transfer by some proceeding at law or in equity having for its object the subjection of the property to the payment of their claims against the vendor. A creditor wishing to proceed against lands fraudulently conveyed may seek the aid of equity, but is not obliged to do so. He may disregard the conveyance, take out execution, and sell the property as that of the fraudulent grantor. On the levy of the execution, its lien may, as against persons not purchasers or encumbrancers in good faith and for value, relate back to the rendition or docketing of the judgment, and in some of the states a judgment is a lien against lands fraudulently conveyed for all purposes, and cannot be displaced in favor of any junior judgment or other lien, the holder of which first proceeds either at law or in equity to seek satisfaction out of the property so conveyed.<sup>1</sup> But we think the better rule is, that one who has obtained judgment, and has not by levy or otherwise taken any further steps to obtain satisfaction out of property fraudulently transferred, has no lien thereon, and in the event of the bankruptcy of the defendant, that he should not be awarded preference as a lien-holder;<sup>2</sup> and even if he may be regarded as having a lien, he cannot lie idle until others have by their superior diligence discovered the fraud and commenced proceedings in equity to thwart it by obtaining the cancellation of the conveyance, and then step forward and reap the first-fruits of their diligence. On the contrary, the creditor who first proceeds in equity to reach property fraudulently transferred thereby obtains a right to priority to which the claims of other judgment creditors, whether prior or subsequent, must yield precedence.<sup>3</sup>

<sup>1</sup> McKee v. Gilchrist, 3 Watts, 231; Jackson v. Holbrook, 36 Minn. 494; 1 Am. St. Rep. 683; Chautauque Bank v. Risley, 19 N. Y. 369; 75 Am. Dec. 347; Smith v. Morse, 2 Cal. 524; Manhattan Co. v. Evertson, 6 Paige, 465; Jacoby's Appeal, 67 Pa. St. 435; Slat-

tery v. Jones, 96 Mo. 216; 9 Am. St. Rep. 344; Dunham v. Cox, 10 N. J. Eq. 347; 64 Am. Dec. 460; Mulford v. Peterson, 35 N. J. L. 127.

<sup>2</sup> In re Estes, 6 Saw. 459; 12 Cent. L. J. 135.

<sup>3</sup> Lyon v. Robbins, 46 Ill. 277; In re

§ 351. **Fixtures.**—Fixtures pass by virtue of sales under judgment. Therefore if by the statute of a state the rolling stock of railroads are made fixtures, they are subject to judgment liens.<sup>1</sup>

§ 352. **Rents.**—If, upon filing a bill to have land sold under the plaintiff's judgment, a receiver of the rents and profits is appointed, all the moneys which come into his hands for rents are, in equity, subject to the lien of the judgment. If the lands are sold for a sum insufficient to satisfy the plaintiff's lien, these funds held by the receiver are immediately applicable towards paying the balance due.<sup>2</sup> A deed reserving a rent charge leaves the grantor an interest in the realty which may be taken and sold under execution.<sup>3</sup>

§ 353. **Term of Years.**—An estate in lands for a term of years, being at common law a chattel, was not bound by the lien, and was liable to be affected by a judgment only through a levy and sale under an execution, like other personal property.<sup>4</sup> Statutes enacted in some of the states treat certain leasehold interests as real property for the purposes of execution sales, and therefore extend judgment liens so as to embrace such interests.<sup>5</sup> If a lessee is by the provisions of his lease entitled to purchase the leased premises on certain specified conditions, this may make his interest subject to a judgment lien when it would not otherwise attach;<sup>6</sup> and after it has attached, the lessor and lessee cannot change the terms of the contract or privilege to purchase, to the prejudice of the judgment creditor.<sup>7</sup> On the other hand, the opinion has

*Estes*, 6 Saw. 459; 12 Cent. L. J. 135; *Rappleye v. International Bank*, 93 Ill. 396; *Boyle v. Maroney*, 73 Iowa, 70; 5 Am. St. Rep. 657; *Bridgeman v. McKissick*, 15 Iowa, 260; *Howland v. Knox*, 59 Iowa, 276.

<sup>1</sup> *R. R. Co. v. James*, 6 Wall. 750.

<sup>2</sup> *United States v. Butler*, 2 Blatchf. 201.

<sup>3</sup> *Hurst v. Sithgrov*, 2 Yeates, 24; 1 Am. Dec. 326.

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<sup>4</sup> *Merry v. Hallet*, 2 Cow. 497; *Vredenberg v. Morris*, 1 Johns. Cas. 223; *Bismarck B. & L. A. v. Bolster*, 92 Pa. St. 123; *Krause's Appeal*, 2 Whart. 398.

<sup>5</sup> *First Nat. Bank of Davenport v. Bennett*, 40 Iowa, 537; *Northern Bank v. Rooze*, 13 Ohio, 334; *Haden v. Goppinger*, 67 Iowa, 272.

<sup>6</sup> *Ely v. Beaumont*, 5 Serg. & R. 124.

<sup>7</sup> *Gorham v. Farson*, 119 Ill. 425.



been expressed that the interest of a lessee under an option entitling him to purchase the leased property is not subject to a judgment lien.<sup>1</sup>

§ 354. **An Estate in Reversion or Remainder**, though it does not entitle the reversioner or remainderman to the immediate possession of lands, is nevertheless, for the purposes of sale and conveyance, whether voluntary or involuntary, treated as an estate in possession. It was liable to be taken under an *elegit*, and is subject to judgment liens, and in most of the United States may be sold under a *feri facias*.<sup>2</sup> The application of this rule was probably restricted to vested remainders. Contingent remainders, conditional limitations, and executory devises were not assignable by the common law, and hence not subject to sale and conveyance under execution. In some of the states the statutes declaring what shall be subject to execution include these contingent interests.<sup>3</sup> In the absence of statutes changing the common law upon this subject, the rule is otherwise, and therefore excludes these interests from the operation of judgment liens.<sup>4</sup>

§ 355. **Property Exempt from Execution**.—We have already seen that the law of judgment liens resulted from and depended upon the right to apply the real estate of the judgment debtor to the satisfaction of the debt. Wherever this right does not exist by virtue of some law exempting specified property from execution and forced sale, no judgment can, as to such property, take effect as a lien. Hence homesteads exempted from execution by statute are thereafter, as long as they retain their home-

<sup>1</sup> *Sweezy v. Jones*, 65 Iowa, 272.

<sup>2</sup> *Burton v. Smith*, 13 Pet. 462; *Watson on Sheriffs*, 208; *Woodgate v. Fleet*, 44 N. Y. 1; *Williams v. Amory*, 14 Mass. 20; *Bishop of Bristol's Case*, 2 Leon. 113; *Brown v. Gale*, 5 N. H. 416; *Humphreys v. Humphreys*, 1 Yeates, 427; *Den v. Hillman*, 6 N. J. Eq. 180; *Wiley v. Bridgman*, 1 Head, 68; *Harrison v. Maxwell*, 2 Nott & McC. 347; 10 Am. Dec. 611; *Doe v.*

*Hazen*, 3 Allen, 87; *Lockwood v. Nye*, 2 Swan, 515; 58 Am. Dec. 73; *Davis v. Goforth*, 1 Lea, 31.

<sup>3</sup> *White v. McPheeters*, 75 Mo. 292; *Sheridan v. House*, 4 Keyes, 590; *Moore v. Littell*, 41 N. Y. 66.

<sup>4</sup> *Allston v. Bank*, 2 Hill Ch. 235; *Watson v. Dodd*, 68 N. C. 528; *Payn v. Beal*, 4 Denio, 405; *Penn v. Spencer*, 17 Gratt. 85; 91 Am. Dec. 375.

stead character, clear from all judgment liens, and may, notwithstanding judgments docketed against their owners, be by them conveyed or encumbered without furnishing any opportunity for such liens to attach.<sup>1</sup> But if the relinquishment of the homestead claim so far precedes the conveyance of the homestead that they cannot be regarded as simultaneous acts, then, an opportunity being given for the attaching of liens, the purchaser receives the property subject to all judgments docketed against the grantor at the time of the conveyance.<sup>2</sup> By early decisions of the supreme courts of Wisconsin and Minnesota, statutes providing, in general terms, that judgments should be liens on all the defendant's real estate were construed as extending such liens over homesteads, which by law were exempt from sale under execution. As a consequence of this construction, the owner of a homestead could not alienate it without at the same moment, by removing the homestead character, leaving the property liable to be sold under any judgment against the alienor at the date of the conveyance.<sup>3</sup> This rule also prevails in several other states.<sup>4</sup> As a judgment is no lien on a homestead, if property, by abandonment or otherwise, loses its homestead character, prior judgments will attach as of the moment of the abandonment, and will therefore have no precedence over one another; and the judgment creditor who first proceeds to enforce his judgment will thereby gain a priority over the other judgment creditors,

<sup>1</sup> *Monroe v. May*, 9 Kan. 475; *Morris v. Ward*, 5 Kan. 247; *Lamb v. Shays*, 14 Iowa, 567; *Wiggins v. Chance*, 54 Ill. 175; *Freeman on Executions*, sec. 218; *Gapen v. Stephenson*, 17 Kan. 617; *Black v. Epperson*, 40 Tex. 162; *Houghton v. Lee*, 50 Cal. 103; *McDonald v. Badger*, 23 Cal. 400; 83 Am. Dec. 123; *Sullivan v. Hendrickson*, 54 Cal. 258; *Grimes v. Portman*, 99 Mo. 229; *Denny v. White*, 2 Cold. 283; 88 Am. Dec. 597; *Dean v. McAdams*, 22 Kan. 544; *Dumbould v. Rowley*, 113 Ind. 353; *Frost v. Shaw*, 3 Ohio St. 720; *Moseley v. Anderson*, 40 Miss. 49; *Buckley v. Wheeler*, 52 Mich. 1.

<sup>2</sup> *Marriner v. Smith*, 27 Cal. 649; *Green v. Marks*, 25 Ill. 222; *Ackley v. Chamberlain*, 16 Cal. 181; 76 Am. Dec. 516.

<sup>3</sup> *Hoyt v. Howe*, 3 Wis. 752; 62 Am. Dec. 705; *Folsom v. Carli*, 5 Minn. 335; 80 Am. Dec. 429; *Tillotson v. Millard*, 7 Minn. 513; 82 Am. Dec. 112. See, to same effect, *Smith v. Brackett*, 36 Barb. 571.

<sup>4</sup> *Eaton v. Ryan*, 5 Neb. 47; 10 West. Jur. 630; *State Bank v. Carson*, 4 Neb. 498; *Moore v. Granger*, 30 Ark. 574; *Jackson v. Allen*, 30 Ark. 110; *Whitworth v. Lyons*, 39 Miss. 467.

and will be entitled to have his judgment first satisfied out of the late homestead.<sup>1</sup> But if a judgment lien has attached to real estate, it cannot be divested by the subsequent occupation of the premises as a homestead.<sup>2</sup> If a homestead is foreclosed and sold under a decree of the court, and judgment is docketed for a deficiency remaining after the sale, such docketed judgment constitutes no lien on the homestead.<sup>3</sup>

In several of the states, if land is purchased for the purpose of occupation as a homestead, the purchaser is allowed a reasonable time in which to enter upon and occupy it as such; and judgments existing against him at its purchase, or at any other time prior to its occupation, do not constitute liens upon it, if he pursues his purpose with reasonable diligence.<sup>4</sup>

Generally, the lands which may be held as a homestead are limited in value or quantity, and a creditor having a judgment may by appropriate proceedings reach so much of the property claimed and occupied as a homestead as is in excess of the quantity or value which the claimant is entitled to retain. As this excess may be taken under execution, it would seem to be subject to judgment, attachment, and execution liens; and this is the conclusion of the courts in Illinois.<sup>5</sup> The supreme court of California, on the other hand, in a series of cases supported by no reasoning whatever, and in our judgment incapable of being supported by any reason, has determined that, however great the value of a homestead, judgment liens cannot attach to it, nor to the excess in quantity or value which the judgment debtor is not entitled to retain.<sup>6</sup>

<sup>1</sup> *Bliss v. Clark*, 39 Ill. 590; 89 Am. Dec. 330; *McDonald v. Crandall*, 43 Ill. 231; 92 Am. Dec. 112.

<sup>2</sup> *Eaton v. Robinson*, 21 Iowa, 531; *Bunn v. Lindsay*, 95 Mo. 250; *Kennedy v. Swartz*, 83 Va. 704; *Kelly v. Dill*, 23 Minn. 435; *Gage v. Neblett*, 57 Tex. 374; *Bullene v. Hiatt*, 12 Kan. 82; *Robinson v. Wilson*, 15 Kan. 448; *Bartholomew v. Hook*, 23 Cal. 278.

<sup>3</sup> *Martens v. Gilson*, 13 Neb. 489; *Hershey v. Dennis*, 53 Cal. 77.

<sup>4</sup> *Hanlon v. Pollard*, 17 Neb. 368; *Edwards v. Fry*, 9 Kan. 417; *Gilworth v. Cody*, 21 Kan. 702; *Monroe v. May*, 9 Kan. 466; *Crawford v. Richeson*, 101 Ill. 357.

<sup>5</sup> *Haworth v. Travia*, 67 Ill. 301; *Eldridge v. Pierce*, 90 Ill. 474; *Moriarity v. Galt*, 112 Ill. 373.

<sup>6</sup> *Barrett v. Sims*, 59 Cal. 618; *Lubbock v. McMann*, 82 Cal. 230; 16 Am. St. Rep. 108; *Sanders v. Russell*, 86 Cal. 119; 21 Am. St. Rep. 26.

§ 356. **The Interests Affected by the Lien.**—When ever a lien attaches to any parcel of property, it becomes a charge upon the precise interest which the judgment debtor has, and no other. The apparent interest of the debtor can neither extend nor restrict the operation of the lien, so that it shall encumber any greater or less interest than the debtor in fact possesses.<sup>1</sup> "Under our system, judgments are liens upon all interests in real estate, legal or equitable. And it is wholly immaterial, as between the parties, whether the interest of the judgment debtor appears of record or not."<sup>2</sup> Where judgments are liens upon equitable interests, such interests are bound, whether the instruments or conveyances attesting the defendant's rights are recorded or unrecorded.<sup>3</sup> The charge cast upon lands by a judgment lien can in no wise be limited or impaired by any act or omission of the debtor. The creditor has a charge on the interests of the defendant in the land just as they stood at the moment the lien attached. Neither by conveyance nor by mortgage,<sup>4</sup> nor by making or *accepting a lease* subsequent to the judgment, can the defendant prejudice the rights of the plaintiff. If the defendant accepts a lease from a third person, the purchaser at the sale under a lien existing prior to such lease is at perfect liberty to dispute the title of the defendant's lessor.<sup>5</sup> The title of heirs and devisees in the real property of their ancestor or testator is, after his death, generally subject to execution;<sup>6</sup> and when so, it must necessarily be affected by the judgment lien. The interest of the devisee can, however, not be alienated so as to impair powers or extinguish rights and interests

<sup>1</sup> *Burke v. Johnson*, 37 Kan. 337; 1 Am. St. Rep. 252; *Holmdell v. Keyport T. Co.*, 34 N. J. Eq. 364.

<sup>2</sup> *Lathrop v. Brown*, 23 Iowa, 40; *Logan v. Herbert*, 30 La. Ann., pt. 1, p. 727.

<sup>3</sup> *Richter v. Selin*, 8 Serg. & R. 425; *Niantic Bank v. Dennis*, 37 Ill. 381.

<sup>4</sup> *Morris v. Mowatt*, 2 Paige, 586; 22 Am. Dec. 661.

<sup>5</sup> *Tinney v. Woolston*, 41 Ill. 215.

For illustrations of the instances in which estates in real property are subject to judgment liens, see *Coombs v. Jordan*, 3 Bland, 284; 22 Am. Dec. 236; also *Freeman on Executions*, c. 12, 13.

<sup>6</sup> *Freeman on Executions*, sec. 183; *Eneberg v. Carter*, 98 Mo. 647; 14 Am. St. Rep. 664.

which the devisee himself could not affect;<sup>1</sup> "copyhold estates and all other tenancies at will or by sufferance are not subject to execution. The reason of the rule is apparent. An occupant by the permission and at the will of the owner has no estate which he can transfer by a voluntary conveyance, and no possession which can be regarded as independent of or adverse to that of the owner. Hence he has no interest in the title, nor in the possession, susceptible of transfer by execution."<sup>2</sup> Estates in reversion or remainder are also subject to execution at law, and must therefore be bound by the judgment lien.<sup>3</sup> Judgment liens attach to the whole substantial interest of judgment debtors;<sup>4</sup> but if they have no such interest, as where they hold the legal title solely for the benefit of third persons, these liens do not attach at all.<sup>5</sup> Where, however, the debtor has a legal estate in real property not held wholly in trust for another, a judgment against him becomes a lien upon his entire interest,<sup>6</sup> whatever it may be. Thus if he has either an ordinary estate for life, or as tenant by curtesy of the lands of his wife, such estate is subject to the liens of judgments against him;<sup>7</sup> but any breach of condition or other cause of forfeiture destroying his estate also extinguishes the lien.<sup>8</sup> If a person has a general power of appointment which he may execute for the benefit of any person whom he may choose, his interest is in equity deemed a beneficial interest, "subject to the demands of

<sup>1</sup> *Bridge v. Ward*, 35 Wis. 687; *O'Hara v. Stone*, 48 Ind. 417; *Leggett v. Doremus*, 25 N. J. Eq. 122.

<sup>2</sup> *Freeman on Executions*, sec. 177; citing *Wildy v. Bonney*, 26 Miss. 35; *Waggoner v. Speak*, 3 Ohio, 292; *Colvin v. Baker*, 2 Barb. 206; *Bigelow v. Finch*, 11 Barb. 498.

<sup>3</sup> *Freeman on Executions*, sec. 178, and cases there cited.

<sup>4</sup> *Campbell v. Spence*, 4 Ala. 543; 39 Am. Dec. 301; *Rodgers v. McClure's Adm'r*, 4 Gratt. 81; 47 Am. Dec. 715. Nor can relief be obtained from a lien because a party acted in ignorance

thereof: *Bunn v. Lindsay*, 95 Mo. 250; 6 Am. St. Rep. 49; *Taylor v. Morgan*, 86 Ind. 295.

<sup>5</sup> *Thomas v. Kennedy*, 24 Iowa, 337; 95 Am. Dec. 740; *Churchill v. Morse*, 23 Iowa, 229; 92 Am. Dec. 422; *Freeman on Executions*, sec. 173.

<sup>6</sup> *Sandford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773.

<sup>7</sup> *Verdin v. Slocumb*, 71 N. Y. 345; *Beard v. Dietz*, 1 Watts, 309; *Bank v. Stauffer*, 10 Pa. St. 398; *Anderson v. Tydings*, 8 Md. 427; 63 Am. Dec. 708.

<sup>8</sup> *Moore v. Pitts*, 53 N. Y. 85.

his creditors in preference to the claims of his voluntary appointees or legatees"; but judgment liens existing against the holder of such a power are generally not recognized at law, and can be enforced in equity only.<sup>1</sup> Lands of which a judgment debtor was disseised seem not to have been subject to extent under an *elegit* in England. In the United States, however, the fact that a defendant is disseised of his real property does not exempt it from sale under execution, if he still has a right of entry.<sup>2</sup> The mere possession of lands is *prima facie* evidence that the possessor is their owner; and his interest, whatever it may be, is in most of the states subject to sale under execution, and doubtless therefore subject to judgment liens against him.<sup>3</sup> If the title to lands occupied by the defendant is shown to be vested in the United States, an execution sale against the possessor cannot divest him of any rights he may have in such lands as a pre-emption or homestead claimant.<sup>4</sup> If, however, he has purchased such lands of the government, and made full payment therefor, or is a claimant of a Mexican grant which he has presented for confirmation, he has an interest subject to execution, and therefore to the lien of judgments; for the patent, when finally issued, will take effect by relation as of the day when payment was made, or when the grant was presented for confirmation.<sup>5</sup> Franchises, such, for instance, as the right to maintain toll-roads, railways, and the like, are ordinarily not subject to execution nor to judgment liens.<sup>6</sup> Where lands have been sold at an execution or judicial sale, and the owner retains the right to redeem them, his interest is gener-

<sup>1</sup> *Brandies v. Cochrane*, 112 U. S. 344; *Clapp v. Ingraham*, 126 Mass. 200; *In re Harvey's Estate*, L. R. 13 Ch. Div. 216; *Hotham v. Somerville*, 9 Beav. 63.

<sup>2</sup> *Freeman on Executions*, sec. 174.

<sup>3</sup> *Freeman on Executions*, sec. 175.

<sup>4</sup> *Freeman on Executions*, secs. 175, 176.

<sup>5</sup> *Freeman on Executions*, sec. 176; *Goodlet v. Smithson*, 5 Port. 245; 30

Am. Dec. 561; *Hamblen v. Hamblen*, 33 Miss. 453; 69 Am. Dec. 358; *Walbridge v. Ellsworth*, 44 Cal. 354.

<sup>6</sup> *Freeman on Executions*, sec. 179; *Ammant v. President etc.*, 13 Serg. & R. 212; 15 Am. Dec. 593; *Wood v. Truckee T. Co.*, 24 Cal. 474; *East Ala. R'y Co. v. Doe*, 114 U. S. 350; *Plymouth R. R. Co. v. Colwell*, 39 Pa. St. 337; 80 Am. Dec. 529; *Scogin v. Perry*, 32 Tex. 21.

ally, but not universally, regarded as subject to execution.<sup>1</sup> The interest of the purchaser during the continuance of this right to redeem is for many purposes treated as an estate in real property, and, as such, subject to execution.<sup>2</sup>

§ 357. **Lien Confined to Actual Interests.** — The judgment lien is a lien only on the interest of the judgment debtor, whatever it may be. Therefore though he seems to have an interest, yet if he has none in fact, no lien can attach.<sup>3</sup> The rights of the lien-owner cannot exceed those which might be acquired by a purchase from the defendant with full notice of all existing legal or equitable rights belonging to third persons.<sup>4</sup> The attaching of the lien upon the legal title forms no impediment to the assertion of all equities previously existing over the property.<sup>5</sup> The judgment lien, being general, is liable to be displaced in equity in favor of a lien having greater equity. Thus where A, being unable to pay for a lot, agreed with C that the latter should advance money to so improve the property purchased that such a sum could be borrowed upon it, as security, as would enable him to make the necessary payment to D, the owner. The conveyance from D was to be held as an escrow until the state of the improvements to be erected warranted the loaning of the desired amount of money. The advances made by C were then to be secured by a second mortgage. The first mortgage having been foreclosed, a contest arose between C and a judgment creditor whose lien attached anterior to the

<sup>1</sup> Freeman on Executions, sec. 182.

<sup>2</sup> Slater's Appeal, 28 Pa. St. 169; Morrison v. Wentz, 7 Watts, 437; Freeman on Executions, sec. 323.

<sup>3</sup> Churchill v. Morse, 23 Iowa, 229; 92 Am. Dec. 422; Coombs v. Jordan, 3 Bland, 284; 22 Am. Dec. 236; Uhl v. May, 5 Neb. 157; Lombard v. Abbey, 73 Ill. 177; Doswell v. Adler, 28 Ark. 83; Holden v. Garrett, 23 Kan. 98.

<sup>4</sup> Baker v. Morton, 12 Wall. 150.

<sup>5</sup> Coster's Ex'r v. Bank of Ga., 24 Ala. 37, 64; Walke v. Moody, 65 N. C. 599; Filley v. Duncan, 1 Neb. 134; 93

Am. Dec. 337; Floyd v. Harding, 28 Gratt. 401; Wharton v. Wilson, 60 Ind. 591; Frazer v. Thatcher, 49 Tex. 26; Goodell v. Blumer, 41 Wis. 436; Warren v. Hull, 123 Ind. 126; Shirk v. Thomas, 121 Ind. 147; 16 Am. St. Rep. 381; Leonard v. Broughton, 120 Ind. 536; 16 Am. St. Rep. 347; Apperson v. Burgett, 33 Ark. 328; Blaken-ship v. Douglass, 26 Tex. 225; 82 Am. Dec. 608; Gulich v. Gulich, 42 N. J. Eq. 323; In Matter of Howe, 1 Paige, 124; 19 Am. Dec. 395; Sweet v. Jaccocks, 6 Paige, 355; 31 Am. Dec. 252.

date of C's mortgage, whereupon it was decided that as there was no period of time when A could have held the lot free from the claims of C, it was impossible for any person to so hold it by virtue of a general lien against A.<sup>1</sup> A judgment lien is, in equity, but a charge on the title held by the defendant when the lien attaches, or which is subsequently acquired. It can only hold the legal estate subject to the equity.<sup>2</sup> "It is well settled that a judgment lien on the land of the debtor is subject to every equity which existed against the debtor at the rendition of the judgment; and courts of equity will always limit the lien to the actual interest of the judgment debtor."<sup>3</sup> "The lien of the judgment creates a preference over subsequently acquired rights, but in equity does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in third persons. Guided by these considerations, the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered."<sup>4</sup> Hence if a deed may be set aside in equity against the grantee for duress, the same relief may be had against a judgment creditor of the grantee.<sup>5</sup>

§ 357 a. A Judgment Entered against a Part Owner binds his moiety of the property, but is subject, as in the case of ownership in severalty, to all existing rights and equities. Therefore if he has sold his interest by a parol contract to his co-tenant, and the latter is in possession under his contract, his rights are paramount to those of the judgment creditor.<sup>6</sup> A judgment against one of several co-tenants cannot impair their right to make partition

<sup>1</sup> Tallman v. Farley, 1 Barb. 280.

<sup>2</sup> Whitworth v. Gaugin, 1 Phill. Ch. 728; Burgh v. Francis, 3 Swanst. 536, note; Finch v. Earl of Winchelsea, 1 P. Wms. 277.

<sup>3</sup> Ellis v. Tousley, 1 Paige, 280;

Morris v. Mowatt, 2 Paige, 586; 22 Am. Dec. 661.

<sup>4</sup> Brown v. Pierce, 7 Wall. 205.

<sup>5</sup> Baker v. Morton, 12 Wall. 150.

<sup>6</sup> Peck v. Williams, 113 Ind. 250.



of the common property, either by suit or agreement. On such partition being made, the lien ceases to affect an undivided interest in the lands, and attaches to the tract set off to the judgment debtor in severalty, or in case partition is accomplished by a sale, then to his share of the proceeds.<sup>1</sup> Property may stand in the name of copartners as tenants in common, while it is in equity regarded as the property of the copartnership. The partners or the creditors of the firm may insist that real estate be treated as partnership assets. In such a case a judgment against the partnership is a lien upon such real estate, and entitled to precedence over liens against the partners based upon their personal or individual debts.<sup>2</sup> In Iowa, however, when the title to real property stands in the name of persons who are partners, and who acquired it with partnership assets and for partnership purposes, the firm is regarded as having an equitable estate only, and such estates not being subject to execution in that state, the only remedy of the judgment creditor is in equity.<sup>3</sup> If a judgment is recovered against either partner, it takes effect upon his legal title; but a sale thereunder to a purchaser having notice of the facts vests in him the legal title, subject to the equities of the other members of the partnership and the right of the creditors of the firm to insist upon its being sold, if necessary, for the satisfaction of the partnership debts.<sup>4</sup>

§ 358. **Against Trustees and Administrators.**—Trustees have no right or authority to act in opposition to

<sup>1</sup> *Eldridge v. Post*, 20 Fla. 579; judgment against all the members of a firm, though not upon a partnership debt, need not yield precedence to a subsequent judgment for a firm debt: *Saunders v. Reilly*, 105 N. Y. 12; 59 Am. Rep. 472; *Davis v. D. & H. C. Co.*, 109 N. Y. 47; 4 Am. St. Rep. 418.  
<sup>2</sup> *Stadler v. Allen*, 44 Iowa, 198.  
<sup>3</sup> *Meily v. Wood*, 71 Pa. St. 488; 10 Am. Rep. 719; *Hoskins v. Johnson*, 24 Ga. 625; *Donnellan v. Hardy*, 57 Ind. 393.  
<sup>4</sup> *Page v. Thomas*, 43 Ohio St. 38; 54 Am. Rep. 788; *In re Codding*, 9 Fed. Rep. 849; but in New York a

*Lauffer v. Cavett*, 87 Pa. St. 479; *Sharp v. Davis*, 76 Ind. 17; *Polhemus v. Empson*, 27 N. J. Eq. 190; *Barrington v. Clarke*, 2 Penr. & W. 124; 21 Am. Dec. 432; *Longwell v. Bentley*, 23 Pa. St. 103; *Williard v. Williard*, 56 Pa. St. 127; *Argyle v. Dwinel*, 29 Me. 45; *Garvin v. Garvin*, 1 S. C., N. S., 55.

their trusts; nor to proceed in relation to the trust estate in a manner different from that provided in the instrument creating the trust. If they hold lands, with power to sell or mortgage on specified conditions, they cannot affect the title by proceeding by different means or upon other conditions. If they seek to bind the land by a confession of judgment, their action, being without authority, creates a lien on nothing but their personal interests, and cannot result in a transfer of the estate of the *cestuis que trust*.<sup>1</sup> And whenever one holds the naked legal title, having no beneficial interest, there is nothing to which the judgment lien can attach, and a sale under execution to a purchaser with notice is inoperative, and does not even convey the legal title.<sup>2</sup> If, however, the trustee has any beneficial interest, the lien attaches to the extent of such interest. The legal title "always may be bound to the extent of the beneficial interest covered by it."<sup>3</sup> A judgment against a receiver of a railroad is not a lien on its property. He is merely an officer of the court, and has no title to which a lien can attach.<sup>4</sup> Executors and administrators are not invested with the title to the real estate of their intestates. Judgments against them, even in their official capacities, are not liens on real estate.<sup>5</sup> Such judgments can be satisfied out of the lands of the deceased, only in the same manner in which satisfaction of other demands may be procured; namely, by an application to the probate court for an order directing the

<sup>1</sup> *Hunt v. Townshend*, 31 Md. 336.

<sup>2</sup> *Freeman on Executions*, sec. 173; *Withell v. Courtland W. Co.*, 25 Fed. Rep. 372; *Hays v. Regar*, 102 Ind. 524; *Fulton's Estate*, 51 Pa. St. 204; *Atkinson v. Hancock*, 67 Iowa, 452; *Boardman v. Willard*, 73 Iowa, 20; *Bostick v. Keiser*, 4 J. J. Marsh. 597; 20 Am. Dec. 237; *Baker v. Copenbarger*, 15 Ill. 103; 58 Am. Dec. 600; *Thomas v. Kennedy*, 24 Iowa, 398; 95 Am. Dec. 740.

<sup>3</sup> *Drysdale's Appeal*, 15 Pa. St. 457; *Martin v. Baldwin*, 30 Minn. 537.

<sup>4</sup> *White v. Keokuk & D. M. R. R. Co.*, 52 Iowa, 97.

<sup>5</sup> *Custer v. Custer*, 17 W. Va. 113; *Cook v. Ryan*, 29 Hun, 249; *Flynn v. Morgan*, 55 Conn. 130; *Williams v. Green*, 80 N. C. 76; *Hamilton v. Beardmore*, 7 Grant (U. C.) 286; *Laidley v. Kline*, 8 W. Va. 218; *Woodyard v. Polesley*, 14 W. Va. 211. Where a judgment against an executor is an admission of assets, and he is therefore personally responsible, it is as much a lien as if rendered upon his personal debt: *Higgin's Trusts*, 2 Giff. 562; 30 L. J., N. S., Ch. 405.

administrator to sell real estate. On this application, the judgment is neither entitled to be treated as a lien nor as conclusive evidence of the debt.<sup>1</sup> At common law no judgment could be entered up after the death of the defendant. But by statute<sup>2</sup> it was provided that the death of either party between verdict and judgment should not thereafter be alleged for error against any judgment entered within two terms after verdict. This statute was construed as giving full force to the judgment authorized by its provisions; and such judgments were held to be liens on the lands of the debtor in the hands of his heir.<sup>3</sup> In California, judgment may be entered up after a verdict, or the decision of any issue of fact, though one of the parties has died; but such judgment is no lien, and is simply payable in the course of administration.<sup>4</sup>

§ 359. **Lands Intended to be Conveyed.**—If A, intending to convey or encumber Black Acre, through mistake conveys or encumbers White Acre, and he afterward corrects his error, or his deed is reformed by proceedings in equity, his grantee will acquire title superior in equity to the lien of any judgment rendered after the intended conveyance of Black Acre.<sup>5</sup> If an attempt is made to convey real property, and the conveyance is defective in any respect, and the grantee is entitled to have it reformed as against the grantor, he is also entitled to have it reformed as against any judgment creditor of the grantor whose lien attached after the grantee became entitled to a perfect conveyance.<sup>6</sup>

§ 360. **Vendor's Lien.**—A mortgage, trust deed, or other instrument given to secure the purchase-money takes precedence over a prior judgment lien against the

<sup>1</sup> *Stone v. Wood*, 16 Ill. 177; *Treadwell v. Herndon*, 41 Miss. 38.

<sup>2</sup> Car. 2, c. 8.

<sup>3</sup> *Sanders v. McGowran*, 12 Mees. & W. 221; 1 Dowl. & L. 405.

<sup>4</sup> California Practice Act, sec. 202; Code Civ. Proc., sec. 669.

<sup>5</sup> *Wells v. Benton*, 108 Ind. 505; *Gouverneur v. Titus*, 6 Paige, 347;

*Swartz v. Stees*, 2 Kan. 236; 85 Am. Dec. 588.

<sup>6</sup> *Stone v. Hale*, 17 Ala. 557; 52 Am.

vendee.<sup>1</sup> But if a mortgage bears date several days after the purchase, and does not purport to be given to secure the payment of purchase-money, a purchaser is not, in the absence of actual notice, affected by the higher character of the mortgage lien arising from the nature of the debt secured by it, and will, if the judgment lien accrued prior to the date of the mortgage, obtain the title free from the claim of the mortgagee.<sup>2</sup> While a judgment lien against a grantee is ordinarily subject to any lien in favor of the grantor for purchase-money, whether recorded or not, yet an exception probably exists in favor of a judgment debtor who has *advanced money*, relying as security for his payment upon the apparently unencumbered title of the debtor in the real estate. Potter, J., in a recent case in New York, said: "I think, upon the whole authorities cited, it may be laid down as a sound rule of equity that a judgment creditor who advances his money upon the faith of unencumbered title upon the record, without notice, is entitled to the lien acquired thereby in preference to secret, unrecorded lien of the vendor for a part of the purchase-money; that such judgment creditor is to be regarded as a *quasi* purchaser for a valuable consideration without notice."<sup>3</sup>

§ 361. **On Property of Wife.**—The right of a wife to her property after a violation by the husband of his marital obligations is superior to the lien of any judgment rendered against him after such violation, and secures to her the immediate use of her lands free from such lien, upon her substantiating her right by procuring a decree of separation for the misconduct of her husband. The rights of the wife cannot be enforced against a *bona fide* purchaser without notice, under a sale made before the

<sup>1</sup> *Parsons v. Hoyt*, 24 Iowa, 154; *Gratt.* 791; *Clark v. Butler*, 32 N. J. *Hugheon v. Davis*, 4 Grant (U. C.) Eq. 664; *Cowardin v. Anderson*, 78 588; *Ruttan v. Levisconte*, 16 U. C. Va. 88; *Bradley v. Bryan*, 43 N. J. Eq. Q. R. 496; *Cake's Appeal*, 23 Pa. St. 396.  
<sup>2</sup> *Curtis v. Root*, 28 Ill. 367.  
<sup>3</sup> *Hullett v. Whipple*, 58 Barb. 224.  
 186; 62 Am. Dec. 328; *Scott v. Warren*, 21 Ga. 408; *Summers v. Darne*, 31

filing of the bill for separation.<sup>1</sup> A husband, intending to make a gift to his wife, and in ignorance that a judgment had been rendered against her prior to her marriage, conveyed land to her, upon being informed of which she expressed her sorrow, and in a few days reconveyed to him. It was decided, however, that he could not avoid the operation of the lien of the judgment against her by proving that the conveyance was made without consideration and without the previous knowledge of the wife; that he had at all times been in possession of the property conveyed; and that the only object of the conveyance was to insure her a home in case of accident to him.<sup>2</sup>

§ 361 a. **Wife's Dower.**—A judgment rendered against a man at any time prior to his marriage creates a lien which after the marriage will continue to be paramount to the wife's claim for dower;<sup>3</sup> but if the lien attaches subsequently to the marriage, it cannot defeat the wife's right to dower.<sup>4</sup> A judgment against a wife or widow cannot operate as a lien against her inchoate right of dower. Even after the death of a husband, a wife's right of dower was, at the common law, a mere chose in action, — nothing but a right by appropriate proceedings to compel her dower to be assigned by her; and this right was not subject to execution.<sup>5</sup> If, however, her dower is as-

<sup>1</sup> Van Duzer v. Van Duzer, 6 Paige, 366; 31 Am. Dec. 257; Sackett v. Giles, 3 Barb. Ch. 204.

<sup>2</sup> Craig v. Monitor Plow Works, 76 Iowa, 577.

<sup>3</sup> Queen Anne's County v. Pratt, 10 Md. 5; Davidson v. Frew, 3 Dev. 3; 22 Am. Dec. 708; Hodges v. McCabe, 3 Hawks, 78; Lane v. Gover, 3 Har. & McH. 394; Robbins v. Robbins, 8 Blackf. 174; Sanford v. McClean, 3 Paige, 117; 23 Am. Dec. 773; Brown v. Williams, 31 Me. 403; Bialand v. Hewett, 11 Smedes & M. 164; Eiceman v. Finch, 79 Ind. 511; Gould v. Luckett, 47 Miss. 96.

<sup>4</sup> Pifer v. Ward, 8 Blackf. 252; Gould v. Luckett, 47 Miss. 116; Gove v. Cather, 23 Ill. 634; 76 Am. Dec. 711; Shaeffer v. Weed, 3 Gilm. 511. If the

judgment be entered on the day of the marriage, it does not have precedence over the wife's claim for dower, but is subordinate thereto: Ingram v. Morris, 4 Harr. (Del.) 111. As a judgment lien does not affect the husband's seisin, it cannot, until by a sale it has transferred the title, destroy the wife's right to dower; and she may have her dower assigned to her, unless a sale has been made, but she holds the assignment subject to the contingency of losing it by a subsequent sale had during the life of the lien: Scribner on Dower, 573.

<sup>5</sup> Freeman on Executions, sec. 185; Ligon v. Spencer, 58 Miss. 37; Pennington v. Yell, 11 Ark. 212; 52 Am. Dec. 262.

signed to her, it doubtless becomes subject to execution to the same extent as any other life estate; and "in equity, if a widow is in possession, or is entitled to an assignment of dower immediately, the want of a mere formal assignment of dower is not considered material. She has no right in conscience or in equity to deprive her creditors of the benefit of her right of dower, for the satisfaction of their debts, by continuing in possession with the heirs and neglecting to ask for a formal assignment."<sup>1</sup>

§ 362. **Every Equitable Lien**, to entitle it to precedence over a judgment lien, ought to be founded on some new consideration; for if the equities are equal, the holder of a judgment lien will be allowed his legal rights. Thus an agreement to make a mortgage to secure a pre-existing debt will not be enforced as an equitable lien against the lien of a judgment rendered subsequently to the agreement and prior to the execution of the mortgage.<sup>2</sup>

§ 363. **Liens against Vendors and Vendees before Conveyance Made.**—We have already shown that the lien of a judgment attaches to the *real* as contradistinguished from the *apparent* interest of the judgment debtor. It follows from this rule that upon the recovery and docking of a judgment against a vendor or a vendee, the interest which may pass by any sale made to render such lien available will be governed, if the lien is against the vendee, by the proportion of the purchase-money paid by him; and if it is against a vendor who retains the legal title, by the portion of purchase-money remaining unpaid.<sup>3</sup> In other words, the purchaser under a lien against a vendee will be entitled to a conveyance from the vendor upon precisely the same terms which would have been open to the vendee under his contract; and a

<sup>1</sup> *Tompkins v. Fonda*, 4 Paige, 449. Neb. 311; *Coolbaugh v. Roemer*, 30

<sup>2</sup> *Dwight v. Newell*, 3 N. Y. 185. Minn. 424; *Bell v. McDuffie*, 71 Ga.

<sup>3</sup> *Minneapolis etc. R'y Co. v. Wilson*, 25 Minn. 382; *Young v. Devries*, 306; 6 Am. St. Rep. 706; *Brown v. Gratt*, 304; *Courtney v. Parker*, 16 Hardee, 75 Ga. 457.

purchaser under a lien against a vendor will be compelled to make a conveyance to the vendee upon precisely the same terms upon which the vendor could have been compelled to convey. In all cases a purchaser at a sale under a judgment "succeeds to the rights and responsibilities of the judgment debtor, and to no other."<sup>1</sup> If the entire sum due from the vendee is paid, a lien against the vendor can attach to nothing but the mere legal title, and can transfer to a purchaser with notice of the payment made nothing but the right to hold such title until the vendee asks for it, and the obligation to transfer it to the vendee when demanded.<sup>2</sup> If a valid contract of sale has been made, but no part of the purchase-money is yet paid, the purchaser has such an equitable interest as courts of equity will protect against the lien of any judgment docketed subsequently to the making of the contract.<sup>3</sup> The holder of a judgment lien against a vendor is entitled to the whole interest of the vendor when the lien attaches. Hence the vendor cannot subsequently alter the contract of sale to the prejudice of his judgment creditor.<sup>4</sup> Neither is the vendor entitled to complete contracts of sale which, from being in parol or for some other cause, were not enforceable against him.<sup>5</sup> Whether the interest of a vendee is subject to judgment liens will depend on whether, under the statutes of the state, equitable estates are subject to liens of this class. If such estates are not subject to execution, then a purchaser, until the legal title vests in him, has no estate subject to a judgment lien;<sup>6</sup> but on his acquiring the legal title, the lien of pre-

<sup>1</sup> Catlin v. Robinson, 2 Watts, 373; Auwerter v. Mathoit, 9 Serg. & R. 402; McMullen v. Wenner, 16 Serg. & R. 20; 16 Am. Dec. 543; Purviance v. Lemmon, 16 Serg. & R. 294; Stannis v. Nicholson, 2 Or. 332; Cromwell v. Craft, 47 Miss. 44; Stewart v. Coder, 11 Pa. St. 94; Garrard v. Lantz, 12 Pa. St. 193; Mellon's Appeal, 32 Pa. St. 128; Railroad Co. v. Wilson, 7 Rep. 243.  
<sup>2</sup> Lounsbury v. Purdy, 11 Barb. 490; Thomas v. Kennedy, 24 Iowa, 397; 95 Am. Dec. 740; McMullen v. Wenner, 16

Serg. & R. 18; 16 Am. Dec. 543; Manly v. Hunt, 1 Ohio, 257; Snyder v. Martin, 17 W. Va. 276; 41 Am. Rep. 670; Pack v. Harnabarger, 17 W. Va. 313.

<sup>3</sup> Lane v. Ludlow, 2 Paine, 591; Hampson v. Edelen, 2 Har. & J. 64; 3 Am. Dec. 530; Keirsted v. Avery, 4 Paige, 9.

<sup>4</sup> Coolbaugh v. Roemer, 30 Minn. 424.

<sup>5</sup> Niles v. Davis, 60 Miss. 750.

<sup>6</sup> Gentry v. Allison, 20 Ind. 481; Roddy v. Elam, 12 Rich. Eq. 343.

existing judgments attaches immediately.<sup>1</sup> On the other hand, where judgments are liens on equitable estates, they are liens on the interests of all vendees holding enforceable contracts of purchase.<sup>2</sup> If, after lands are held under an agreement to sell, a judgment is docketed against the vendee, and the vendor conveys to the vendee, reserving a lien for purchase-money still unpaid, the lien of the judgment is thereby enlarged so as to embrace the whole estate, subject, however, to the *vendor's lien*.<sup>3</sup>

§ 364. **Liens Accruing against Vendor after the Sale as Notice to Vendee.**—While it is everywhere conceded that a judgment lien accruing against a vendor after the making of the contract of sale extends to all his interest remaining in the land, and entitles the purchaser at the sale to all sums still to be paid by the vendee, yet it is well settled that the latter, *if in possession of the lands sold*, is not bound to ascertain, before making each payment, that no judgment has been obtained against his vendor. Whoever takes and keeps possession of land, by these acts of ownership gives such notice of his rights to the whole world that no one can safely assume to act in ignorance of them. He is so far exempted from the operation of the registry acts that a deed made by his grantor can in no event prejudice his interests; and so far exempted from the operation of the law charging all persons with notice of the lien arising from the docketing of a judgment that such docketing, while he is *in possession of the*

<sup>1</sup> Waters's Appeal, 35 Pa. St. 523; 78 Am. Dec. 364.

<sup>2</sup> Adams v. Harris, 47 Miss. 144; Pugh v. Good, 3 Watts & S. 56; 37 Am. Dec. 534; Rand v. Garner, 75 Iowa, 311; Stevens v. Sellers, 59 Ga. 540; Holmes's Appeal, 108 Pa. St. 23.

<sup>3</sup> Episcopal Academy v. Frieze, 2 Watts, 16. In North Carolina it has recently been held that if a vendor of land takes notes for the part of the purchase-money remaining unpaid, retaining the title to secure the payment of such notes, a judgment will not,

after his death, constitute a lien on the land nor on the notes, but the notes when collected will be assets in the hands of his executors for the payment of debts: Moore v. Byers, 65 N. C. 240; and the recent decisions in Iowa, though somewhat obscure, tend in the same direction: Woodward v. Dean, 46 Iowa, 499. If a judgment is entered against a vendee, its lien is not displaced by a decree, in favor of the vendor, setting aside the sale, unless the judgment creditor was a party to such decree: Stevens v. Sellers, 59 Ga. 540.



land, is not notice to him of the charge thereby created on the purchase-money remaining unpaid. He may, therefore, from time to time, pay to his vendor such sums as fall due; and he will always be entitled to the benefit of such payments, unless it can be shown that they were made with *actual knowledge* of a lien on the vendor's interest in the land. This construction of the law seems to have been dictated by a consideration of the hardship to be inflicted on the vendee in possession by establishing a different rule. "It may be said a party holding a contract upon which payments remain to be made may, before making such payments, examine for judgments against the vendor; but it would be an intolerable inconvenience to require this, where the payments, as is usually the case, are to be made annually or oftener; and should such examination ever be strict, the vendee would have to run the risk of an encumbrance intervening while he was going from the office where the search was made to the residence of the vendor to make the payment."<sup>1</sup> In delivering the opinion of the then highest court of the state of New York, granting vendees in possession a like exemption from the operation of the doctrine of *lis pendens*, Senator Seward said: "Was not their possession notorious? and is it not a well-settled principle of law that possession of land is notice to all the world, requiring those who would concern themselves in it, or litigate for it, to take notice, not only of the possession itself, but of the right, title, and interest, whatever it may be, of the possessor? Is it not far more equitable and just to require the complainant thus to take notice of such an obvious, notorious interest, than to hold the humble tenant, located in the woods in the extreme western part of the state, to search the office of the register or assistant register at Albany or New York, every time an

<sup>1</sup> Moyer v. Hinman, 13 N. Y. 180, 137; Hampson v. Edelen, 2 Har. & reversing the judgment of the supreme J. 64; 3 Am. Dec. 530; Filley v. Duncan, 1 Neb. 134; 93 Am. Dec. 337.

installment becomes due on his contract, to see if peradventure a bill may not have been filed by some creditor, heir, or devisee which may possibly involve the vendor's title?"<sup>1</sup>

In Ohio a judgment becomes a lien as of the first day of the term. A party had, in that state, made a parol contract for the purchase of lands and had paid a small part of the purchase-money. He knew that an action was pending against his vendor which might result in a judgment. Notwithstanding this knowledge, he paid the vendor the balance of the purchase-money and received a conveyance of the premises. A judgment was subsequently rendered against the vendor, and if allowed to take effect as of the first day of the term, had precedence over the conveyance. The vendor sought to have this lien removed; but the judgment creditor insisted that, to the extent of the purchase-money remaining unpaid on the first day of the term, the judgment was a valid lien, which ought not to be discharged without payment of the residue of the purchase price. The court thought this claim of the judgment creditor rested upon sound principles and was well supported by authority. "The defendant in error," said the court, "was under no obligation to pay to her vendor the remainder of the purchase-money during the term of court at which she knew judgment might be rendered against him. She might have required indemnity against the lien of such judgment, or retained the unpaid purchase-money for its extinguishment. Its voluntary payment during the term gave her, as we think, no equity against the judgment creditor."<sup>2</sup>

§ 365. Lien of Judgment for Purchase-money. — To the general rule that a sale under a judgment against a vendee affects nothing but his interest in the land must be admitted an exception, arising in all cases where the judg-

<sup>1</sup> *Parks v. Jackson*, 11 Wend. 442; 25 Am. Dec. 656.

<sup>2</sup> *Lefferson v. Dallas*, 20 Ohio St. 68.

ment is recovered for the balance of the purchase-money. In all these cases, the judgment creditor must be considered as selling, in addition to the *vendee's present interest*, all the interest to which he would have been entitled upon payment of the money sued for. The purchaser therefore succeeds to the title held by both vendee and vendor.<sup>1</sup> "Nothing is better settled than this, that if the vendor, at the time of parting with his title, takes a mortgage or judgment as a part of the transaction to secure his purchase-money, he retains a lien upon the estate conveyed, not to be displaced by any other encumbrance." Hence if at the date of a conveyance a mechanic's lien existed against the vendee for certain buildings on the land, such lien cannot take precedence over a judgment entered on the same day the conveyance was made, to secure to the vendor the payment of the residue of the purchase-money.<sup>2</sup>

**§ 366. Of the Priority of Unrecorded Instruments over Judgment Liens.** — Wherever, under the law, a deed<sup>3</sup> or mortgage<sup>4</sup> is valid without being recorded, a subsequently attaching judgment lien against the grantor or mortgagor will not be of any benefit to the lien-holder as against the deed or mortgage. Under the principle already referred to, that the lien of a judgment attaches to the debtor's real rather than to his apparent interest, such lien is subordinate to any unrecorded conveyance or encumbrance executed prior to the rendition of the judgment, unless

<sup>1</sup> Vierheller's Appeal, 24 Pa. St. 105; 62 Am. Dec. 365; Ziegler's Appeal, 69 Pa. St. 471.

<sup>2</sup> Stoner v. Neff, 50 Pa. St. 260. In Georgia, a judgment against a vendee in favor of a vendor, though he has parted with the legal title, seems to retain the benefit of the vendor's lien for purchase-money, and therefore to have precedence over any other judgment against the vendee, though of prior date: McAlpin v. Bailey, 76 Ga. 687; Allen v. Sharp, 62 Ga. 183.

<sup>3</sup> Norton v. Williams, 9 Iowa, 528; Bell v. Evans, 10 Iowa, 353; Wilcox

son v. Miller, 49 Cal. 193; Apperson v. Burgett, 33 Ark. 328; Schroeder v. Guernsey, 73 N. Y. 430.

<sup>4</sup> Cathrow v. Eade, 1 Smale & G. 423; Seevers v. Delashmutt, 11 Iowa, 174; 77 Am. Dec. 189; Larimer's Appeal, 22 Pa. St. 41; Hampton v. Levy, 1 McCord Eq. 107. A judgment creditor is not a purchaser for value, and therefore his lien is subordinate to pre-existing rights: Beavan v. Oxford, 6 De Gex, M. & G. 507; Goodwin v. Williams, 5 Grant (U. C.) 539; Gillespie v. Van Egmond, 6 Grant (U. C.) 533.

the statutes of the state give to judgment creditors the same protection against unrecorded instruments which they give to *bona fide* purchasers without notice. In other words, a judgment creditor is not, prior to the sale of property under execution issued upon his judgment, entitled to protection as a purchaser. But a *purchaser* at a sale under a judgment is, to the same extent as if he were purchaser at a private or voluntary sale, protected from claims previously acquired by third persons from the judgment debtor of which he had no actual nor constructive notice.<sup>1</sup> But if, at the *time of the sale*, the purchaser has actual notice of any legal or equitable right in a third person, or if, in the absence of such notice, the instrument evidencing such right is properly of record, or if possession is held under it, then the title acquired by the purchaser cannot prejudice the interests of such third person.<sup>2</sup> In many of the United States, however, the registry laws so modify the effect of conveyances and other instruments concerning real estate as to give a judgment lien precedence over any unrecorded instrument of which the judgment creditor had no knowledge at the date of the attaching of the lien of his judgment;<sup>3</sup>

<sup>1</sup> Paine v. Mooreland, 15 Ohio, 435; 45 Am. Dec. 585; Cooper v. Blakey, 10 Ga. 263; Ehle v. Brown, 31 Wis. 414; Jackson v. Chamberlain, 8 Wend. 625; Den v. Richman, 13 N. J. Eq. 43; Ayres v. Duprey, 27 Tex. 605; Morrison v. Funk, 23 Pa. St. 421.

<sup>2</sup> Davis v. Ownsby, 14 Mo. 170; 55 Am. Dec. 105; Hoy v. Allen, 27 Iowa, 208; Valentine v. Havener, 20 Mo. 133; Chapman v. Coats, 26 Iowa, 288; Byers v. Engles, 16 Ark. 543.

<sup>3</sup> Guiteau v. Wisely, 47 Ill. 433; McFadden v. Worthington, 45 Ill. 362. The tendency of the recent statutes and the decisions interpreting them is to give a judgment lien precedence over a prior unregistered conveyance or encumbrance, especially if the plaintiff had no notice of it when his judgment was docketed or registered or the levy of his writ made: Grace v. Wade, 45 Tex. 523; Cavanaugh v. Peterson, 47 Tex. 198; Mainwaring

v. Templeman, 51 Tex. 205; Firebaugh v. Ward, 51 Tex. 409; Eidson v. Huff, 29 Gratt. 338; Anderson v. Nagle, 12 W. Va. 98; Andrews v. Mathews, 59 Ga. 466; Wood v. Lake, 9 Rep. 342; Young v. Devries, 31 Gratt. 304; Doyle v. Wade, 23 Fla. 90; 11 Am. St. Rep. 334; Wilcox v. Leominster Bank, 43 Minn. 541; 19 Am. St. Rep. 259; Reed v. Austin, 9 Mo. 722; 45 Am. Dec. 336; Columbus B. Co. v. Graves, 108 Ill. 459; Dutton v. McReynolds, 31 Minn. 66; Herrman v. Strecklin, 60 Miss. 234; Blohme v. Lynch, 26 S. C. 300; Metropolitan Bank's Appeal, 100 Pa. St. 418; Clark v. Duke, 59 Miss. 575; Morris v. White, 30 N. J. Eq. 324; Manufacturers' & M. Bank v. Bank of Pa., 7 Watts & S. 335; 42 Am. Dec. 240; Hawkins v. Files, 51 Ark. 417; Mississippi V. Co. v. Chicago etc. R. R. Co., 58 Miss. 846; Eldridge v. Post, 20 Fla. 579.

and the holder of the lien takes all the title the records show to be in the judgment debtor.<sup>1</sup> In Alabama, by statute, when a conveyance of real estate is made, it must be recorded within sixty days, or it will be void against creditors or subsequent purchasers without notice. Under this statute it has been held that if a judgment creditor is not affected with notice of an unrecorded deed, he acquires a lien not limited nor avoided by the deed, and under which a perfect title may be acquired by a purchaser having *full notice of the former deed*;<sup>2</sup> and in general, under this or similar statutes, if the lien once attaches so as to take precedence over prior deeds in favor of a judgment creditor, it is not liable to be defeated by the subsequent recording *before the sale* of a previously executed instrument, nor by giving actual notice of the existence of such instrument.<sup>3</sup>

§ 366 a. **Purchase by Judgment Creditor.**—We have seen that the lien of a judgment is subordinate to all rights, whether legal or equitable, capable of enforcement against the judgment debtor when the lien attached; but that strangers purchasing at an execution sale become thereby purchasers within the meaning of the registry laws, and, as such, are protected. The judgment creditor may also become a purchaser at the sale. In so doing he may make a bid, and thereby produce a complete or partial satisfaction of his judgment. The question then arises whether he thereby becomes a purchaser for value, and whether, as such, he is protected by the registry law from infirmities in the debtor's title, of which, when purchasing, the creditor had no notice, actual or constructive. In Iowa, a judgment debtor, at the rendition of the judgment, held lands under an implied trust, in pursuance of which, subsequently to the judgment, he made a conveyance to his *cestui que trust*. The latter failed to record his

<sup>1</sup> *Martin v. Dryden*, 1 Gilm. 187;  
*Massey v. Westcott*, 40 Ill. 160.

<sup>2</sup> *De Vendell v. Hamilton*, 27 Ala. 156.

<sup>3</sup> *Pollard v. Cooke*, 19 Ala. 188;  
*Faah v. Ravenses*, 32 Ala. 451.

deed, and the lands were sold to the creditor, without any notice of the deed or of the facts out of which it arose. The supreme court thought this a proper case in which to apply the "wholesome rule of equity that where one of two innocent persons must suffer, the loss will fall upon that party who has been guilty of the first negligence," and therefore sustained the title of the creditor based on the purchase under his own judgment.<sup>1</sup> This case was but an affirmance of a prior decision in the same state, declaring that "when a creditor merges his judgment into a title, without actual or constructive notice of prior equities, he becomes a purchaser, and is entitled to protection, in the absence of equitable circumstances with any other subsequent *bona fide* purchaser."<sup>2</sup> But probably the current of authorities dissents from the conclusions reached in Iowa, and maintains that "to constitute a person a *bona fide* purchaser within the meaning of the statute, he must, upon the faith of the purchase of the property, have advanced for it a valuable consideration"; and that "if he was a creditor antecedent to his purchase, and paid for the purchase by a credit on his demand, then, inasmuch as he has parted with no consideration on the faith of the purchase, he is not a *bona fide* purchaser within the meaning of the statute."<sup>3</sup>

§ 367. **After-acquired Title.**—As long ago as the year 1813, in the case of *Calhoun v. Snyder*, the judges in Pennsylvania, in deference to a long course of decisions in that state, were constrained to decide that no judgment could ever attach as a lien upon lands in which the judgment debtor had *no interest* at the date of its rendition. The judge delivering this opinion at the same time said: "I

<sup>1</sup> *Gower v. Doheney*, 33 Iowa, 36.

<sup>2</sup> *Halloway v. Platner*, 20 Iowa, 121; 89 Am. Dec. 517; *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62.

<sup>3</sup> *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 657; *Orme v. Roberts*, 33 Tex. 768; *Wright v. Douglass*, 10 Barb. 97; *Dickerson v. Tillinghast*, 4 Paige, 215; 25 Am. Dec. 528; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; 47 Am. Dec. 527; *Banning v. Edes*, 6 Minn. 402; *Carnahan v. Yakes*, 87 Ind. 62.

am well satisfied that by the English common law lands purchased by the defendant after judgment, but aliened before execution, were bound by the lien."<sup>1</sup> Forty-seven years later, it was said, in the same state, that "whatever may be thought of the doctrine of *Calhoun v. Snyder*, that a judgment lien does not bind subsequent acquired real estate, it is too firmly established in the jurisprudence of this state to be shaken at this day."<sup>2</sup> The rule thus established in Pennsylvania, and confessedly repugnant to the common law, was adopted in a few other American cases. It is, nevertheless, clearly repudiated, in favor of the common-law rule, by the vast majority of the American decisions<sup>3</sup> declaring judgments to be liens upon real property acquired by the defendant after their rendition.<sup>4</sup> The rule of *Calhoun v. Snyder* is, in Pennsylvania, restricted to real estate in which the judgment debtor had *no interest*. If at the rendition of a judgment the debtor had entered into a binding contract for the purchase of lands, the lien bound not only his present interest under the contract, but all the interests which he might *subsequently acquire thereby*, and took precedence over a judgment entered against the defendant immediately after his acquisition of the title by a conveyance from his vendor.<sup>5</sup>

§ 368. **Precedence of Judgment Liens on After-acquired Lands.**—A statute of the state of Mississippi provided "that in all cases the property of the defendants shall be

<sup>1</sup> *Calhoun v. Snyder*, 6 Binn. 135.

<sup>2</sup> *Waters's Appeal*, 35 Pa. St. 523; 78 Am. Dec. 354.

<sup>3</sup> *Roads v. Symmes*, 1 Ohio, 281; 13 Am. Dec. 621; *Harrington v. Sharp*, 1 G. Greene, 131; 48 Am. Dec. 365; *Stives v. Murphy*, 4 Ohio, 92; *Filley v. Duncan*, 1 Neb. 134; 93 Am. Dec. 337, since overruled; *McCormack v. Alexander*, 2 Ohio, 65; *Ross's Appeal*, 106 Pa. St. 82.

<sup>4</sup> *Ridge v. Prather*, 1 Blackf. 401; *Ralston v. Field*, 32 Ga. 453; *Handly v. Sydenstricker*, 4 W. Va. 605; *Trustees v. Watson*, 13 Ark. 74; *Ridgely's Ex'rs v. Gartrell*, 3 Har. & MoH. 449;

*Steele v. Taylor*, 1 Minn. 274; *Davis v. Benton*, 2 Sneed, 665; *Colt v. Dubois*, 5 Rep. 659; *Barron v. Thompson*, 9 Rep. 766.

<sup>5</sup> *Harrison v. Roberts*, 6 Fla. 711; *McClung v. Beirne*, 10 Leigh, 394; 34 Am. Dec. 739; *Greenway v. Cannon*, 3 Humph. 177; 39 Am. Dec. 161; *Wales v. Bogue*, 31 Ill. 464; *Colt v. Dubois*, 7 Neb. 391; *Leonard v. White Cloud F. Co.*, 11 Neb. 340; *Relfe v. McComb*, 2 Head, 558; 78 Am. Dec. 748; *Lisle v. Cheney*, 36 Kan. 578.

<sup>6</sup> *Stephen's Appeal*, 8 Watts & S. 186.

bound and liable to any judgment that may be entered up from the time of entering such judgment." In considering the effect of the provision just quoted, it was held that as the lien could not attach to property owned by another, it could not take effect upon after-acquired real estate until the moment of its acquisition,<sup>1</sup> and that upon taking effect it did not relate back to the rendition of the judgment. From this view it follows that if two judgment liens have been docketed against a defendant, they will both attach to subsequently acquired property at the same moment, and neither will have any priority over the other on account of its prior docketing or rendition.<sup>2</sup> This construction seems to be of undisputed correctness, and to be adopted wherever the question has arisen,<sup>3</sup> except in Oregon, in which state judgments, even as against subsequently acquired realty, are, as liens, given precedence in the order of their docketing.<sup>4</sup> Except in that state, judgment liens, as against property acquired after their docketing, being equal, the holders thereof are permitted to acquire priority in accordance with principles to be stated in a subsequent section of this chapter.

#### PART III.—OF THE PRIORITY OF JUDGMENT LIENS.

§ 369. **Judgments of Same Term.** — At common law, all judgments were, by legal fiction, supposed to be entered on the first day of the term at which they were recovered. But it was a maxim of the same law that "a legal fiction is always consistent with equity." Therefore, whenever the purposes of justice required it, the true time of entering judgment might be averred and proved.<sup>5</sup> While neither the existence of the maxim nor its applicability to cases requiring a determination of the rights and equities of lien-holders seem ever to have been drawn in

<sup>1</sup> *Cayce v. Stovall*, 50 Miss. 396; *Greenway v. Cannon*, 3 Humph. 177; *Barth v. Makeever*, 4 Biss. 206. 39 Am. Dec. 161. See sec. 355, as to homesteads abandoned.

<sup>2</sup> *Moody v. Harper*, 25 Miss. 484.

<sup>3</sup> *Michaels v. Boyd*, 1 Ind. 259; *Davis v. Benton*, 2 Sneed, 665; *Relfe v. McComb*, 2 Head, 558; 75 Am. Dec. 748;

<sup>4</sup> *Creighton v. Leeds*, 9 Or. 215.

<sup>5</sup> *Broom's Legal Maxims*, 122; *Morgan v. Nance*, 26 Ga. 283.



question, undoubtedly a very decided contrariety of opinion was expressed by the judges in deciding parallel cases in which the precedence of judgment liens was considered. As between different creditors, there would rarely be any violation of the principles of equity occasioned by placing on an equality judgments in fact entered on different days of the same term. Hence we find it declared that such judgments are equal as liens, and entitled to be paid *pro rata* out of the debtor's real estate.<sup>1</sup> And the rule treating judgments entered at the same term as entered at the same time, and therefore neither judgment as having precedence over any of the others, still prevails in some parts of the United States;<sup>2</sup> and in those states where judgments are deemed to be entered on the last day of the term, they cannot become liens until such day.<sup>3</sup> In Maryland, judgments rendered on different days of the same term were never treated as relating to the first day of the term, but were given effect as liens according to the priority of their entry.<sup>4</sup> In Pennsylvania, for more than a century preceding the year 1805, by an uninterrupted practice, the legal fiction was disregarded, and judgments took precedence over one another according to the date of their rendition. "As between conflicting judgment creditors, the well-known rule applied to the truth of the fact as to the entry of judgments, *Qui prior est tempore, potior est jure.*"<sup>5</sup> A similar rule was laid down at an early date by the supreme court of the United States.<sup>6</sup>

However the fiction of law by which judgments are considered as being rendered on the first day of the term may affect one judgment lien in a contest with other liens of the same nature, it seems to be generally conceded that

<sup>1</sup> *Porter v. Earthman*, 4 Yerg. 358; *Johnson v. Mitchell*, 17 Ga. 593.

<sup>2</sup> *Kellerman v. Aultman*, 30 Fed. Rep. 888; *Farley v. Lea*, 4 Dev. & B. 169; 32 Am. Dec. 680; *Norwood v. Thorp*, 64 N. C. 682; *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 642; *Colt v. Dubois*, 7 Neb. 291; *Jeffrey v. Moran*, 101 U. S. 285.

<sup>3</sup> *Bradish v. State*, 35 Vt. 452; *Chase v. Gilman*, 15 Me. 64; *Goodall v. Harris*, 20 N. H. 363; *Dyson v. Simmons*, 48 Md. 207; *Hanson v. Barnes*, 3 Gill & J. 357; 22 Am. Dec. 322.

<sup>4</sup> *Anderson v. Tuck*, 33 Md. 225.

<sup>5</sup> *Welch v. Murray*, 4 Yeates, 197.

<sup>6</sup> *Welch v. Murray*, 4 Dall. 320.

it cannot prejudice the interests of *bona fide* purchasers. Whenever a purchaser, before the signing of judgment, without notice, and without being guilty of any fraud, acquires an interest in real estate, that interest cannot be charged with the lien of any judgment subsequently entered against his grantor, though such judgment might, as between itself and other judgments, rank as though entered at the beginning of the term, and at some time prior to its actual rendition.<sup>1</sup> In Virginia, the rule that judgments relate to the first day of the term has always prevailed,<sup>2</sup> unless the court in fact met for the term on a day subsequent to that appointed by law for the first day of the term, in which case a judgment lien was decided not to overreach a conveyance recorded before the day on which the court met, though after the time when it ought to have met.<sup>3</sup> In order to rank as of the first day of the term at which it was rendered, the judgment must be the final determination of an action which was in such a condition that it might have been tried and disposed of on the first day if it had happened to have the first place on the calendar.<sup>4</sup> The reason why judgments rendered at different dates were ever treated as of equal rank was because all the cases ready to be tried at the opening of a given term were equally entitled to the precedence arising from being first decided; and in order to avoid giving any suitor an advantage due entirely to the fortuitous circumstance that his cause was first called for trial, it was thought proper, by aid of a legal fiction, to assign his judgment a place in no wise superior to that assigned to others equally entitled to precedence.

<sup>1</sup> Pope v. Brandon, 2 Stew. 401; 20 Am. Dec. 49; Ex parte Stagg, 1 Nott & McC. 406; Rybner v. Frank, 106 Ill. 326; Morgan v. Sims, 26 Ga. 233. A judgment entered against a defendant who has died since the first day of the term is valid, because it has relation as of the first day of the term; but such a judgment is not a lien: Nichols v. Chapman, 9 Wend. 452; Stymets v. Brooks, 10 Wend. 207.

<sup>2</sup> Coutts v. Walker, 2 Leigh, 292;

Brockenbrough v. Brockenbrough, 31 Gratt. 530.

<sup>3</sup> Skipwith's Ex'r v. Cunningham, 8 Leigh, 272; 31 Am. Dec. 642. The case of Horsley v. Garth, 2 Gratt. 471, 44 Am. Dec. 393, does not, so far as we can judge, overrule or limit the case last cited.

<sup>4</sup> Withers v. Carter, 4 Gratt. 407; 50 Am. Dec. 78; Yates v. Robertson, 80 Va. 475.

In some portions of the United States, judgments are not liens from the date of their rendition, nor from either the beginning or the end of the term of court at which they are rendered, but from the date of their being docketed in the mode prescribed by statute, or from the filing of an abstract, transcript, or copy thereof in some public office. In some of the states, there are special provisions of statute giving judgments of certain classes the effect of liens from some date earlier than that either of their rendition or of the commencement of the term of court. Thus judgments for taxes are usually treated as liens operating from the date of the levy of the taxes, and therefore as passing title to the property from the date of such levy, though it may have been conveyed thereafter, and before the commencement of the action, to one who is not a party thereto.<sup>1</sup> In Indiana, a judgment against an administrator and the sureties on his official bond is a lien on their real estate from the beginning of the action;<sup>2</sup> and in West Virginia a judgment against a sheriff is a like lien on his realty from the time of the service of process upon him.<sup>3</sup>

§ 370. **Fractions of a Day.**—The common-law fiction assigning the same period of time to the entry of all judgments of a single term is very generally abolished in the United States, either by statutory enactments, or by a long course of practice grown up in defiance of the common law of England. Therefore it is now, in this country, more important to determine whether the lien of a judgment extends over the whole of the *day* on which it attaches, than it is to understand whether, under the common-law practice, it extends over a whole *term*. The decisions upon the question whether fractions of a day should be regarded in determining the effect properly to be accorded to a judgment lien have extended over three classes of cases. The first class includes cases involving

<sup>1</sup> *Jenkins v. Newman*, 122 Ind. 99.

<sup>2</sup> *Hoge v. Brookover*, 28 W. Va.

<sup>3</sup> *Day v. Worland*, 92 Ind. 75.

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the precedence of judgment liens between one another; the second class includes cases involving the relative priority of judgment and other liens; and the third class includes cases determining the rights of purchasers in good faith from judgment debtors prior to the actual rendition and docketing of the judgment. It seems to be well settled, in relation to cases of the first class, that unless the law provides for fractions of days, all judgments entered on the same day will be regarded as if entered at the same time, and as creating liens equal in point of priority, and entitled to be paid *pro rata* out of the debtor's real estate.<sup>1</sup> Still, this rule does not prevail universally. In many instances, courts have inquired, even as between different judgments, the precise time when they were rendered or docketed, and decided that the law will take notice of fractions of days in the contests between creditors seeking to have funds realized from the sale of lands applied in satisfaction of their judgment liens.<sup>2</sup>

Upon principle, one who advances money and takes a mortgage or deed of trust as security ought to be protected from secret liens to the same extent as if he were a purchaser of the property taking a conveyance of the legal title. The authorities, however, do not concur in this conclusion. In some of them, mortgagees are treated with the same indulgence granted to purchasers; and if a judgment lien attached the same day that the judgment debtor gave a mortgage upon some of his real property, precedence will be accorded to the mortgage, if the evidence satisfies the court that it was executed prior to the attaching of the judgment lien. In Pennsylvania, between mortgages and judgments, no fractions of days will be considered. A mortgage and a judgment entered

<sup>1</sup> *Rockhill v. Hanna*, 4 McLean, 555; *Pat. & H.* 11; *Cook v. Dillon*, 9 Iowa, 407; 74 Am. Dec. 354.  
*Bruce v. Vogel*, 38 Mo. 100; *Mechanics' Bank v. Gorman*, 8 Watts & S. 304;  
*Burney v. Boyett*, 1 How. (Miss.) 39; *Lemon v. Staats*, 1 Cow. 592; *Biggam v. Merritt*, Walk. (Miss.) 430; 12 Am. Dec. 576.  
<sup>2</sup> *Metzler v. Kilgore*, 3 Penr. & W. 245; 23 Am. Dec. 76; *Ladley v. Creighton*, 70 Pa. St. 490; *Janney v. Stephen*, 2

on the same day will be regarded as taking effect simultaneously, and as entitled to be paid *pro rata*.<sup>1</sup>

In determining the rights of purchasers as opposed by holders of judgment liens, fractions of days will undoubtedly be considered, because it is "necessary for the purposes of simple justice to ascertain the hour of the entry of the lien."<sup>2</sup> But even here judges who conceded the necessity and propriety of considering fractions of days have nevertheless refused to enter into any examination *beyond the record*, in order to ascertain the precise hour at which a judgment was rendered or docketed. In their opinion, the matter of precedence was to be adjudged in favor of the judgment lien, unless *upon the record* it appeared to be subsequent to the purchase, and the inquiry into the actual period when the lien in fact attached was, if permitted to be pursued beyond the record, liable to produce evil and inconvenience not to be compensated by the probable good to flow from such inquiry.<sup>3</sup> But the more sensible view is that announced in Pennsylvania, where it was held that, in a contest with a purchaser from the judgment debtor, "as an indispensable measure of justice, the precise time at which the judgment was entered must be shown by less than record proof," and further, that to affect lands in the hands of a purchaser, a judgment must not only be simultaneous, but anterior.<sup>4</sup> It is a little remarkable that the keen sense of the "purposes of simple justice" under which the courts of the last-named state have professedly been impelled to protect purchasers has not also operated for the benefit of mortgagees and other lien-holders who, like purchasers, part with some valuable consideration upon their faith in a

<sup>1</sup> *Murfee v. Carmack*, 4 Yerg. 270; *Ladly v. Creighton*, 70 Pa. St. 490; 26 Am. Dec. 232; *Berry v. Clements*, 9 Humph. 312; *Follett v. Hall*, 16 Ohio, 111; 47 Am. Dec. 365; *Hendrickson's Appeal*, 24 Pa. St. 363; 26 Am. Dec. 232; *Berry v. Clements*, *Claason's Appeal*, 22 Pa. St. 359; 9 Humph. 312; *Johnson v. Edda*, 58 Miss. 664. (Del.) 432.

<sup>2</sup> *Small's Appeal*, 24 Pa. St. 398; *'Mechanics' Bank v. Gorman*, 3 Watts & S. 304.

title which seems to be perfect, and which in fact is perfect, at the moment the consideration is parted with. Certainly, if "the law divides the day where equity requires it,"<sup>1</sup> it cannot but divide it to prevent loss to one who loans money or parts with anything valuable, when the inducement for his action is the security given him upon the then unencumbered real estate of the borrower. In fact, the equity of the mortgagee to the extent of his claim is not necessarily nor ordinarily inferior to the equity of a purchaser; and nothing but our regard for precedents, supported neither by justice nor by reason, can induce us to extend any protection to the latter which we would withhold from the former.

Even under the common-law rule that judgments take effect as liens as of the first day of the term at which they are rendered, if an encumbrance or conveyance is executed or recorded on a day in term time, it has precedence over judgments rendered at that term, if it was executed or recorded before the court was in fact open for the transaction of the business of such term.<sup>2</sup> If a judgment lien attaches on a day on which a conveyance or encumbrance is made, it is *prima facie* entitled to precedence; and to escape it, those claiming under the conveyance or encumbrance must assume the burden of proof, and satisfy the court that the judgment did not become a lien until after such conveyance or encumbrance became operative.<sup>3</sup>

§ 371. **Office Hours.** — Notice will not be taken of the fraction of the day preceding office hours in determining the relative precedence of judgments among one another. All records taken to the clerk's office before office hours will be regarded as if filed at the time provided by law for opening that office.<sup>4</sup>

<sup>1</sup> Small's Appeal, 24 Pa. St. 398.

<sup>2</sup> Follett v. Hall, 16 Ohio, 111; 47 Am. Dec. 365; Holliday v. Franklin Bank, 16 Ohio, 533.

Am. Dec. 129; Clark v. Duke, 59 Miss.

575. See also Hoppock's Ex'r v. Ramsey, 28 N. J. Eq. 413.

<sup>3</sup> Wardell v. Mason, 10 Wend.

<sup>4</sup> Boyer's Estate, 51 Pa. St. 432; 91

575.

§ 372. **Judgment on Day of Sale.**—If lands are sold under a judgment, another judgment entered on the same day, but previously to the sale, is nevertheless, according to the construction of the law adopted in Pennsylvania, a lien on the land, and, as such, entitles its holder to the residue of the proceeds of the sale to the extent of its amount after all senior liens, if any, are satisfied.<sup>1</sup>

§ 373. **Conveyance or Encumbrance of Land Simultaneously with its Acquisition.**—No doubt one against whom a judgment has already been docketed may purchase land, and at the same time he receives his conveyance may give, to secure any portion of the purchase-money, a mortgage or trust deed, which will take precedence over the judgment as a lien on the lands purchased.<sup>2</sup> If an absolute deed is made and intended as a mortgage, and afterwards a judgment is docketed against the grantor in such deed, and the grantee then reconveys, at the same time taking a mortgage as security for his debt in lieu of the deed, this mortgage will take precedence over the judgment lien.<sup>3</sup> The reason assigned for this is, that the conveyance and encumbrance of the land being simultaneous, no opportunity is given for the judgment lien to attach. But it has also been decided that if, upon acquiring land, the judgment debtor immediately executes a mortgage, not for purchase-money, the lien of the mortgage will be subordinate to that of the judgment.<sup>4</sup> If this decision is correct, the simultaneous execution of the conveyance and of the mortgage has no power to prevent the attaching of the judgment lien, and we must look for some other reason upon which to justify the decisions

<sup>1</sup> Small's Appeal, 24 Pa. St. 398.

<sup>2</sup> Curtis v. Root, 20 Ill. 53; Cake's Appeal, 23 Pa. St. 186; 62 Am. Dec. 323; Cowardin v. Anderson, 78 Va. 88; Strauss v. Bodecker, 86 Va. 543. But it has been held that if, after a trust deed has been given for purchase-money, a judgment is recovered against the grantor, one who subsequently advances money with which the debt

secured by the trust deed is paid, and who takes a mortgage to secure such advances, is not entitled to be subrogated to the trust deed, and hence his mortgage is subordinate to the judgment lien: Hoffman v. Ryan, 21 W. Va. 415.

<sup>3</sup> Christie v. Hale, 46 Ill. 117.

<sup>4</sup> Root v. Curtis, 38 Ill. 192.

giving precedence to mortgages for purchase-money than that of simultaneousness. This reason is readily found when we remember that it is a universally recognized principle of law that no judgment lien can be a charge upon any greater interest than the defendant owns. A purchaser who has paid only a portion of the sum contracted to be paid has no title which is not liable to be subjected to the lien of the vendor for unpaid purchase-money. A judgment against such a vendee must therefore be subordinate as a lien to that held by the vendor; and for this purpose it is perfectly immaterial whether the claim is put in the shape of a vendor's lien or of a mortgage to secure the payment of purchase-money. As a confirmation of the theory that it is not the simultaneous nature of the encumbrance, but the fact that it represents an interest in the land, never in fact owned by the encumbrancer, which gives it precedence over judgment liens of anterior date, we cite a case decided in Pennsylvania. A conveyance of lands was made and delivered to the grantee sixteen miles from the county seat, where the records were kept. This transaction was completed on Saturday evening. At the same time, the grantor took judgment bonds to secure payment of the balance due upon the purchase-money. He had judgment entered upon these bonds on the following Monday. This judgment was afterward given precedence as a lien on the land purchased over judgments previously docketed, because it was thought to be unreasonable to require judgment to be entered on Saturday night or on Sunday.<sup>1</sup> Now, in this case abundant time was given for the judgment lien to attach, if it were possible for it to attach, so as to outrank any vendor's lien of which reasonable notice was given. It is not the fact that the debtor's seisin is momentary which prevents the lien from attaching, but the fact that he either has no interest or an interest subject to the payment of purchase-money or to the dis-

<sup>1</sup> Jacob's Appeal, 23 Pa. St. 477.



charge of some other obligation. Hence if, while he was not the owner of realty, he made a conveyance thereof with covenants of warranty, so that any title which he may acquire must inure to his grantee, a judgment recovered against him after he entered into the covenant will not attach to any title which he may acquire, because the acquisition cannot be held for his benefit, but at once vests in his prior grantee.<sup>1</sup> Whenever one is a mere conduit, as where he purchases property in his name as the agent of another, with the latter's funds, and subsequently conveys to him, there is no interest to which a judgment lien can attach.<sup>2</sup> The same result arises when title is placed in the name of a person solely to enable him to procure a loan thereon, and after procuring the loan, he reconveys to his grantor;<sup>3</sup> or where a husband and wife convey land to a third person for the purpose of enabling him to convey to her.<sup>4</sup>

§ 374. **Priority Acquired by Diligence.**—If two or more judgments, on account of their contemporaneous rendition or docketing, or from any other cause, are equally entitled to precedence as liens on the real estate of the judgment debtor, this equality may be destroyed, in order to give precedence to the lien-holder who first attempts to subject any specific real estate to the payment of his lien. "The law favors diligent creditors," and the courts seem to be unanimous, where liens are otherwise equal, in according to him who first takes property in execution the right to be first satisfied out of its proceeds.<sup>5</sup>

<sup>1</sup> *Watkins v. Wassell*, 15 Ark. 73; *Lamprey v. Pike*, 28 Fed. Rep. 30; *Skidmore v. Pittsburgh etc. R. R. Co.*, 112 U. S. 33.

<sup>2</sup> *Atkinson v. Hancock*, 67 Iowa, 452.

<sup>3</sup> *Ransom v. Sargent*, 22 Kan. 516; *Hasleton v. Lesure*, 9 Allen, 24.

<sup>4</sup> *Harrison v. Andrews*, 18 Kan. 535.

<sup>5</sup> *Cook v. Dillon*, 9 Iowa, 407; 74 Am. Dec. 354; *Lippincott v. Wilson*, 40 Iowa, 425; *Waterman v. Haskin*, 11 Johns. 228; *Adams v. Dyer*, 8

*Johns.* 347; 5 Am. Dec. 344; *Bruce v. Vogel*, 38 Mo. 100; *Burney v. Boyett*, 1 How. (Miss.) 39; *Freeman on Executions*, sec. 203; *Tilford v. Burnham*, 7 Dana, 109; *Smith v. Lind*, 29 Ill. 24; *Reeves v. Johnson*, 12 N. J. L. 33; *Shirley v. Brown*, 80 Mo. 244. If, however, several writs are in the sheriff's hands at the same time, it is not material that the property was sold under one only. All are entitled to participate in the proceeds: *Gay v. Rainey*, 89 Ill. 221; 31 Am. Rep. 76.

Where different judgment creditors pursue different remedies, each is considered as having elected to follow the remedy with which he commences, and therefore is treated as entitling himself to precedence in regard to that remedy, and as forfeiting his claim to precedence in any of the other remedies pursued by his co-creditors. Judgments were severally on the same day entered in favor of P., S., and R. R. took the defendant on *capias ad satisfaciendum*. P. and S. each took out *fiery facias* on the same day and levied on the defendant's lands. Afterward the defendant was released from imprisonment by operation of laws provided for the relief of insolvents. R. then took out *fiery facias*, and levied on the lands already levied upon by P. and S. Writs of *venditioni exponas* being subsequently issued on all of the judgments, the land was sold by the marshal, producing a sum insufficient to pay the several liens of R., S., and P., whereupon it became necessary to determine the relative claims of R., S., and P. upon the proceeds of the sale. In pronouncing the opinion of the court, it was stated that by the common law he who, where the liens of several judgments were equal, first extended the land of the defendant by *elegit* thereby became entitled to be first satisfied out of it; and that in case one judgment creditor took out an *elegit*, another took the body of the defendant on a *capias ad satisfaciendum*, and the third took *fiery facias* on goods and chattels, each would thereby elect his remedy and entitle himself to priority therein. Applying these common-law rules to the case under consideration, the court appropriated the proceeds of the marshal's sale to the satisfaction of the claims of P. and S.<sup>1</sup>

§ 375. **Priority Acquired by Superior Equity.** — Two judgments were entered on the same day, and were therefore equal in point of time. By one, A recovered against B and C; by the other, B recovered against C. It was

<sup>1</sup> *Rockhill v. Hanna*, 15 How. 189.

held that the equity of A to be paid out of C's land was superior to that of B; and he was therefore awarded the entire proceeds of a sale of C's real estate.<sup>1</sup>

§ 376. **On Writ of Error Bond.** — A statute of Texas enacted that a writ of error bond shall have the force and effect of a judgment, upon which execution may issue in case of forfeiture. The forfeiture takes place on the affirmance of the judgment by the appellate court. The lien of the statutory judgment binds all lands owned by the sureties at or subsequent to the execution of the bond, though alienated before the judgment of affirmance is pronounced.<sup>2</sup>

§ 377. **Sales under Junior Judgments.** — The sale of lands under execution in no wise affects the lien of a prior judgment, nor does it necessitate any change in the proceedings required to make such lien effectual.<sup>3</sup> The holder of the elder lien may, at any time, during the life of his lien, sell the land previously sold under a junior judgment. Upon the expiration of the statutory period of redemption, he may take out his deed, and thereby obtain title paramount to and free from all sales and claims based upon junior liens.<sup>4</sup> If the same plaintiff has two judgment liens on the same land, he may sell under the junior, without releasing or otherwise affecting the senior, unless it can be shown that he was guilty of some fraud upon the purchaser, as by misleading him in relation to the existence of the senior judgment.<sup>5</sup> The sale of lands under a junior judgment passes title subject to all prior liens. The money produced by such sale, therefore, cannot be applied to the satisfaction of such liens, but must, to the extent of his debt, be given to the creditor under whose judgment it was realized.<sup>6</sup> In some of the states

<sup>1</sup> *Vierheller's Appeal*, 24 Pa. St. 105; 62 Am. Dec. 365.

<sup>2</sup> *Berry v. Shuler*, 25 Tex. Supp. 140.

<sup>3</sup> *Lathrop v. Brown*, 23 Iowa, 40;

*Commercial Bank v. Yazoo Co.*, 6 How. (Miss.) 530; 38 Am. Dec. 447.

<sup>4</sup> *Rankin v. Scott*, 12 Wheat. 177; *Littlefield v. Nichols*, 42 Cal. 372.

<sup>5</sup> *Shotwell v. Murray*, 1 Johns. Ch.

512.

<sup>6</sup> *Bruce v. Vogel*, 38 Mo. 100.

this rule does not prevail. On the contrary, a sale, though under a junior judgment, vests title in the purchaser free of the lien of senior judgments, but they are entitled to precedence in distributing the proceeds of the sale.<sup>1</sup> We have heretofore considered the question of the lien of judgments upon lands which have been conveyed for the purpose of delaying or defrauding creditors,<sup>2</sup> and shown that in some of the states such judgments are not liens, in the absence of the issue and levy of writs of execution; but that upon such levy being made, the lien probably became effective by relation as of the date of the judgment. In the states referred to, the holder of a junior judgment who first issued execution, and by his superior diligence discovered and levied upon lands so conveyed, would doubtless be awarded precedence in the distribution of the proceeds of the sale, and the title of the purchaser at such sale would be deemed paramount to the lien of prior judgments, the levy under which was subsequent to that under which the sale was made.<sup>3</sup> If the holder of a junior judgment proceeds by creditor's bill to reach assets not subject to execution at law, or to vacate a fraudulent transfer of property liable to execution at law, he thereby obtains precedence over all other judgment creditors, and is entitled to the first proceeds of any property which by the aid of his suit is made answerable for the obligations of the judgment debtor.<sup>4</sup>

§ 378. **Preferred Debts of United States.**—The fifth section of the act of March 3, 1797, provided: "That when any revenue officer, or other person, hereafter becoming

<sup>1</sup> *Jones v. Wrights*, 60 Ga. 364; 93 Ill. 396; *Freeman on Executions*, sec. 434; *George v. Williamson*, 28 Trumbo v. Cumming, 20 S. C. 334; Mo. 190; 72 Am. Dec. 203; *Dargan v. Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435; *Waring*, 11 Ala. 588; 46 Am. Dec. 234; *Pullis v. Robison*, 73 Mo. 201; 39 Am.

<sup>2</sup> *Ante*, sec. 350.

<sup>3</sup> *Boyle v. Maroney*, 73 Iowa, 70; 5 Rep. 497; *Gracey v. Davis*, 3 Strob. Am. St. Rep. 667; *Howland v. Knox*, Eq. 55; 51 Am. Dec. 663; *Freedman's S. & T. Co. v. Earle*, 110 U. S. 710.

<sup>4</sup> *Rapleye v. International Bank*,

indebted to the United States, shall become insolvent, or where the estate of any deceased debtor in the hands of his executor or administrator shall be insufficient to pay all his debts, the debt due to the United States shall be paid first." The priority here created does not yield to any class of creditors; therefore, in the distribution of assets, any claim of the United States has the precedence over judgment liens held by individuals.<sup>1</sup>

PART IV.—OF THE SUSPENSION AND DISCHARGE OF JUDGMENT LIENS.

§ 379. **Suspension by Capias ad Satisfaciendum.**—A judgment may, through various circumstances, seem to be no longer of any force or effect, and may afterwards, by virtue of some judicial proceeding, or by the happening of some unexpected event, be restored to its former condition. From its inseparable connection with the judgment, the lien may seem first to lose and then to regain its vitality. The restoration of the judgment and of its lien is always subject to the rights acquired during their temporary suspension. The taking of the defendant in execution has always, at common law, been recognized as an extinguishment of the judgment, subject to the contingency of a revivor by virtue of his death in prison, or his escape therefrom without the plaintiff's consent. But while the happening of this contingency may restore to plaintiff the right to enforce his judgment by action or by appropriate process, it does not prejudice interests acquired by third persons while the debtor was in custody. "The arrest waives and extinguishes all other remedies on the goods or lands of the debtor while the imprisonment continues, and if the debtor be discharged by the consent of the creditor, the judgment is forever extinguished, and the plaintiff remitted to such contracts or securities as he

<sup>1</sup> U. S. v. Duncan, 12 Ill. 523; Conrad v. Insurance Co., 1 Pet. 444; 92 U. S. 618. See also Lewis v. United States, 611. *Contra*, Hoppock v. Thellusson v. Smith, 2 Wheat. 396; Shaber, 69 N. C. 153. Brent v. Bank of Washington, 10 Pet.

has taken as the price of the discharge. But if the plaintiff be remitted to other remedies by a discharge of his debtor by act of law or by an escape, it will not operate to restore his lien on the debtor's property, which he has elected to waive or abandon as against creditors who have obtained a precedence during such suspension. The case of *Sneed v. McCoul*, 12 How. 407, in this court, fully confirms this doctrine. It is to be found in the common law as early as the Year Books, and is admitted to be the law in almost every state in the Union: See Year Book, 33 Henry VI., p. 48; *Foster v. Jackson*, Hob. 52; *Barnaby's Case*, 1 Strange, 653; *Vigers v. Aldrich*, 4 Burr. 2483; *Jaques v. Withy*, 1 Term Rep. 557; *Taylor v. Waters*, 5 Maule & S. 163; *Ex parte Knowell*, 13 Ves. Jr. 193. And in New York: *Cooper v. Bigalow*, 1 Cow. 56; *Ransom v. Keyes*, 9 Cow. 128. In Pennsylvania: *Sharp v. Speckengle*, 3 Serg. & R. 463. In Massachusetts: *Little v. Bank*, 14 Mass. 443."<sup>1</sup> In a few of the states, if from any cause, after a defendant has been taken in execution, the conditional satisfaction resulting therefrom terminates, and the plaintiff becomes entitled to an execution against property, the lien of the judgment is revived, and becomes entitled to precedence over junior judgments.<sup>2</sup>

§ 380. **Suspension by Forthcoming Bond.**—A forthcoming bond has, in some of the states, when followed by a statutory judgment thereon, the effect of operating as a satisfaction of the original judgment.<sup>3</sup> But if the sureties upon such bond prove insolvent, it may, in a court of law, be quashed, on motion of the creditor. In that event he is remitted to his rights under his judgment. It is said that a court of equity may, without the formality of

<sup>1</sup> *Rockhill v. Hanna*, 15 How. 189; *Jackson v. Benedict*, 13 Johns. 533; *Griswold v. Hill*, 2 Paine, 492; *Sneed v. McCoul*, 12 How. 407; *Chapman v. Hatt*, 11 Wend. 41; *Cohen v. Grier*, 4 McCord, 507; *Freeman v. Ruston*, 4 Dall. 214.

<sup>2</sup> *Mazyck v. Coil*, 3 Rich. 235; *Hall v. Moye*, 2 Bail. 9; *Trustees v. Pratt*, 10 Md. 5; *Owen v. Glover*, 2 Cranch C. C. 578.

<sup>3</sup> *Bank of U. S. v. Patton*, 5 How. (Miss.) 200; 35 Am. Dec. 423.

quashing the bond, treat it as a nullity, and afford the creditor such relief as he would be entitled to if it had not been given.<sup>1</sup> In a case where it was claimed that the quashing of the bond and the vacation of the new or statutory judgment restored the plaintiff to the benefit of his lien as it stood when the bond was given, the claim *was denied* in the following language: "We do not assent to this view of the effect of the order vacating the new judgment, so far, at least, as respects the liens or rights of third parties which have legally attached in the mean time to the goods of the defendant discharged from the original judgment by the giving of the forthcoming bond. After the lien was suspended or discharged, the original judgment being, in contemplation of law, satisfied by the new and substituted security, the debtor was at liberty to deal with the property as his own, and it remained in his possession, subject to any charge or lien impressed upon it either by act of the party or by operation of law, the same after the forthcoming bond as before the entry of the original judgment. Possibly, as between the parties, the judgment revived, but it would be against principle and work manifest injustice to give to it this retrospective operation, so as to extinguish the intermediately acquired rights of third persons. We deny to it this effect. It would be otherwise if the forthcoming bond had been shown to be void, as it might then be treated as a nullity, and as affording no foundation for the statutory judgment consequent upon the forfeiture."<sup>2</sup> The mere giving of a forthcoming or delivery bond does not, of itself, satisfy the judgment, nor destroy either its lien or the lien of an execution issued upon it. The judgment and execution liens continue, notwithstanding the taking of such bond, until through its forfeiture another judgment is entered thereon, having the effect of merging or satisfying the original judgment. If no judgment is entered upon the bond in fact or in contemplation of law, or if, though so

<sup>1</sup> Jones v. Myrick's Ex'r, 8 Gratt. 179.

<sup>2</sup> Brown v. Clarke, 4 How. 13, 14.

entered, the courts of the state deny that it extinguishes the original judgment, then the lien of the latter remains in full force, notwithstanding the taking of the bond.<sup>1</sup>

§ 381. **Vacation and Restoration of Judgment.**—In some of the states, a judgment may be opened for the purpose of letting the defendant into a defense without affecting its lien.<sup>2</sup> Generally, however, the vacation of judgment by order of the court leaves the judgment debtor at liberty to dispose of and encumber his real estate as if the judgment had never been rendered. Upon a reversal of the order of vacation, the judgment creditor is restored to all his rights, except so far, only, that his restoration cannot prejudice persons not parties to the suit, in relation to any interest they have acquired during the vacation. But liens existing in subordination to that of the judgment at the date of its vacation will occupy a like subordinate position after its restoration. "When the order vacating a judgment is set aside, the lien is revived in all its pristine vigor, and is as effective as before the order was made, except as to rights acquired in the mean time."<sup>3</sup> A judgment may be reversed by an appellate court, and the cause remanded for a new trial; and the new trial may result in a similar judgment to that reversed. This, however, cannot be regarded as a reinstatement of the former judgment. "It cannot be contended, with any show of reason, that after a judgment is reversed it has any vitality to support a continuing lien."<sup>4</sup>

§ 382. **Appeal, with Stay of Execution.**—The stay of execution consequent upon filing a sufficient bond for

<sup>1</sup> *Biscoe v. Sandefur*, 14 Ark. 568; 481; *Cope's Appeal*, 96 Pa. St. 294; *Lawson v. Jordan*, 19 Ark. 297; 70 *Kittanning Ins. Co. v. Scott*, 101 Pa. St. 449.  
<sup>2</sup> *King v. Harris*, 34 N. Y. 330; affirming 30 Barb. 471; *Leonard's Appeal*, 94 Pa. St. 180.  
<sup>3</sup> *Cope's Appeal*, 96 Pa. St. 294;  
<sup>4</sup> *Steinbridge's Appeal*, 1 Penr. & W. Foot v. Dillaye, 65 Barb. 521.



that purpose pending an appeal neither discharges nor suspends the lien; it merely suspends, during the pendency of the appeal, the right of the judgment creditor to realize the benefit of his lien by a sale of the defendant's real estate.<sup>1</sup> Though the appellate court, instead of merely ordering that the judgment appealed from be affirmed, enters a new judgment of its own, which, in effect, is but an affirmance of the judgment of the trial court, the latter is not thereby merged nor extinguished, nor is its lien impaired.<sup>2</sup> In Georgia, a different rule prevails. By statute a judgment so appealed from loses its lien, except for the single purpose of preventing alienations. If of two judgments, equal as liens, one is appealed from, it loses its place as a lien. If, in the higher court, judgment is entered in favor of the appellant, it does not relate back, but operates as a lien only from the time of its entry in the appellate court.<sup>3</sup> A similar effect seems to have been produced by an appeal, in Pennsylvania, from an award obtained under a compulsory arbitration act, which declares that such an award "shall have the effect of a judgment against the party against whom it is made, and be a lien on his real estate until such judgment be reversed on appeal." A creditor appealed, and thereby secured a judgment more favorable to himself; but it was held that he could not claim under both judgments, and could not have a lien by virtue of either; that a purchaser, after the award and before the judgment, took title free from the award because it was superseded, and free from the judgment because it did not exist.<sup>4</sup> In California, "the lien continues two years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, in which case the lien of the judgment ceases."<sup>5</sup> In Alabama, indepen-

<sup>1</sup> *Low v. Adams*, 6 Cal. 277; *Curtis v. Root*, 28 Ill. 367; *Thulemeyer v. Jones*, 37 Tex. 560; *Moore v. Rittenhouse*, 15 Ohio St. 310; *Covington v. Bass*, 88 Tenn. 496.

<sup>2</sup> *Planters' Bank v. Calvit*, 3 Smedes

& M. 43; 41 Am. Dec. 616; *Montgomery v. McGimpsey*, 7 Smedes & M. 557.

<sup>3</sup> *Snelling v. Parker*, 8 Ga. 122.

<sup>4</sup> *Lentz v. Lamplugh*, 12 Pa. St. 344.

<sup>5</sup> Code Civ. Proc., sec. 671.

dently of any statute so declaring, the court reached the conclusion that an appeal and a *supersedeas* destroyed the lien of the judgment.<sup>1</sup>

§ 383. **Dormant Execution.** — “Questions in regard to dormant executions generally, and I believe invariably, arise between conflicting claimants of *personal property*. The doctrine on this subject does not apply to real estate, the lien upon which depends upon the docketing of the judgment, and not upon the execution or levy.” The lien of the judgment as to real estate never becomes dormant until it expires by the limitation imposed by statute.<sup>2</sup> The plaintiff has a right to enforce his lien during any part of the time provided by law.

If when a judgment is entered, or afterwards, the court directs that execution be stayed for a time specified, this does not in any way affect the lien of the judgment, nor prevent it from attaching at once and continuing during the period in which the right to enforce the judgment is suspended.<sup>3</sup> If, however, there is no statute declaring judgments to be liens, and their lien is dependent solely upon the right to take lands in execution, then probably a judgment with a stay of execution does not create a lien until from the expiration of such stay the plaintiff first obtains the right to levy upon realty to satisfy his judgment.<sup>4</sup> A stay of execution resulting from the agreement of the creditor does not impair his judgment lien. Therefore he may, if he sees proper, agree with the defendant not to take out execution during any specified period, without subordinating his lien to that of junior judgments.<sup>5</sup> But if he causes an execution to

<sup>1</sup> *Campbell v. Spence*, 4 Ala. 543; *United States v. Winston's Ex'r*, 2 39 Am. Dec. 301.

<sup>2</sup> *Muir v. Leitch*, 7 Barb. 341.

<sup>3</sup> *Anderson v. Tydings*, 8 Md. 427; 63 Am. Dec. 708; *Pickett v. Doe*, 5 8medes & M. 478; 43 Am. Dec. 523; *Lisle v. Cheney*, 36 Kan. 578; *Isler v. Brown*, 66 N. C. 556.

<sup>4</sup> *Scriba v. Deanez*, 1 Brock. 167; *Burton v. Smith*, 13 Pet. 364; *Bank of*

*United States v. Morrison*, 4 Pet. 124.

<sup>5</sup> *Love v. Harper*, 4 Humph. 113; *Muir v. Leitch*, 7 Barb. 341; *Brewster v. Clampit*, 33 Ark. 72; *Burk's Appeal*, 89 Pa. St. 398; *Marshall v. Moore*, 36 Ill. 321. *Contra*, *Sanford v. Ogden*, 34 Ala. 118.

be taken out and levied upon personal property, thereby producing a conditional satisfaction of his own judgment and depriving other judgment creditors of the benefit of a levy on the same personalty, he cannot withdraw his levy and insist on the operation of his judgment as a lien on real estate, to the prejudice of third parties.<sup>1</sup>

One who enters satisfaction will not be permitted to cancel it and revive his judgment lien to the prejudice of strangers who have acted on their faith in the apparent satisfaction.<sup>2</sup> On the other hand, it has been determined that an entry of satisfaction procured by fraud will be vacated, even when third persons have become interested in the property, unless they show that they knew of and were induced to act by such entry.<sup>3</sup> So if a judgment is satisfied by the sale of property, the vacation of the sale revives the judgment lien,<sup>4</sup> so that it has precedence over junior judgment liens which accrued prior to the vacating of the sale.<sup>5</sup> Generally, the revival of a judgment operates prospectively only, and does not impair conveyances made prior to such revival.<sup>6</sup>

§ 384. **Discharge by Act of Defendant.** — Payment is the only act by which the defendant can discharge or avoid the lien of a judgment.<sup>7</sup> It is the duty of a sheriff having an execution to receive payment of the judgment, if a tender of the amount due be made to him. But such tender neither discharges the judgment nor removes its lien. If the tender is refused, the remedy available for the debtor is to apply to the court on motion to restrain the sale and to enter satisfaction of the judgment. If no attempt is made to obtain such redress in court, the party making the tender cannot treat the judgment as satisfied. "The doctrine of tender is not applicable, for that cannot be made after an action is commenced; and in cases

<sup>1</sup> *Lyon v. Hampton*, 20 Pa. St. 46.

<sup>2</sup> *Page v. Benson*, 22 Ill. 484.

<sup>3</sup> *Renick v. Ludington*, 14 W. Va. 367.

<sup>4</sup> *McHany v. Schenk*, 88 Ill. 357.

<sup>5</sup> *McHany v. Schenk*, 88 Ill. 357.

<sup>6</sup> *Coombs v. Jordan*, 3 Bland, 384;

22 Am. Dec. 236.

<sup>7</sup> *Tinney v. Wolston*, 41 Ill. 219.

where a tender is made in season, and the creditor refuses, the effect is merely to discharge the debtor from subsequent interest. The principal is never discharged, unless under peculiar circumstances, as where there was not, after the tender and refusal, any remedy to enforce the payment of the debt or the performance of his duty. The debt still remains due and the judgment in force."<sup>1</sup>

§ 385. **Division of County or State.**—A lien which has once attached must remain until it is discharged by act of the parties, removed by subsequent legislation, or has expired by statutory limitation. Therefore the erection of a new county<sup>2</sup> or a new state<sup>3</sup> subsequently to the docketing of the judgment, including in its limits the lands of the debtor, does not release or otherwise affect the lien.

§ 386. **By Nonclaim.**—In Pennsylvania, a long series of decisions established the rule that a sale made by an officer under an execution divests all liens of a definite amount, and that the lien creditor, omitting to claim out of the proceeds of the sale, nevertheless loses his right to resort to the land.<sup>4</sup>

§ 387. **Of Judgments Discharged by Frauds.**—If the plaintiff, through fraudulent misrepresentations, is induced to release his lien or to satisfy his judgment, an intervening purchaser of the property who participated in the fraud will not be protected from the lien thus sought to be avoided.<sup>5</sup>

§ 388. **Discharge by Merger of Judgment.**—The merger occasioned by one judgment being recovered upon another, as it extinguishes the judgment sued upon as a cause of action, also destroys its effect as a lien.

<sup>1</sup> Jackson v. Law, 5 Cow. 248; affirmed on appeal in Law v. Jackson, 9 Cow. 641.

<sup>2</sup> Davidson v. Root, 11 Ohio, 98; 37 Am. Dec. 411; Bowman v. Hovious, 17 Cal. 471; Hay's Appeal, 8 Pa. St. 182.

<sup>3</sup> Gatewood v. Goode, 23 Gratt. 880.

<sup>4</sup> Comm'rs of Spring Gardens' Appeal, 8 Watts & S. 444.

<sup>5</sup> White v. Jones, 38 Ill. 159.

§ 389. **Cannot be Restored.** — The payment of a judgment in whole or in part releases the lien to the extent of the payment; and it cannot be restored as a lien by any subsequent agreement between the parties.<sup>1</sup> In Pennsylvania it seems to be competent for the parties in interest to prolong the lien by agreement. Thus A recovered judgment against B, April 4, 1846; B afterwards conveyed to C real estate liable to the judgment lien. D then had judgment against C, July 24, 1850. On the twenty-eighth day of March, 1851, A and C agreed that the first-named judgment should continue to be a lien for another term of five years. It was afterwards decided that A and C had power thus to prolong the lien; that B was not a necessary party to the agreement; that the *terre tenant*, being the only person injured by the arrangement, was the only one who need join with the plaintiff therein; and that D, being a mere second encumbrancer, could not avoid C's contract with A.<sup>2</sup>

§ 390. **Discharge by Sale under.** — A, B, and C had judgments against D, having priority as here named. B levied upon and sold D's land, realizing a sum insufficient to pay his judgment. A deed under this sale issued to the purchaser, the time for redemption having first expired. Meantime A sold the same land under his judgment. B, during the period allowed for redemption from A's sale, but subsequently to the expiration of the period allotted for redemption from his own sale, attempted to redeem as a judgment creditor, and paid money sufficient for that purpose, and C thereafter attempted in like manner to redeem from B. Upon these facts the court decided that by the sale under B's judgment, which had become absolute by the issuance of the deed therefor, the lien of B's judgment and of all judgments over which it had pre-

<sup>1</sup> Purdy v. Doyle, 1 Paige, 558; Johns. Ch. 247; Renick v. Ludington, Denegre v. Haun, 13 Iowa, 240; De 14 W. Va. 367.  
<sup>2</sup> la Vergne v. Evertson, 1 Paige, 181; Sames's Appeal, 26 Pa. St. 184.  
19 Am. Dec. 411; Troup v. Wood, 4

cedence was exhausted; and that therefore *neither B nor C* was qualified to make a valid redemption.<sup>1</sup> Judgment creditors are generally accorded the right to redeem the real property of their debtors which has been sold under execution; but when one of such creditors makes a sale under his judgment for a sum not sufficient to satisfy it, his lien is extinguished as against the lands sold, and therefore he cannot redeem them from such sale.<sup>2</sup> But some other qualified person may redeem, and then the question arises whether the balance due on the judgment under which the sale is made constitutes a lien on the property; and if so, does it rank as a lien from the date of the redemption, or from that of the docketing of the judgment? As a judgment creditor, after selling the lands of his debtor, has no right to redeem them, nor to again sell them in satisfaction of his judgment while the former sale remains in force,<sup>3</sup> if he becomes again entitled to sell them because of their redemption, his lien should be regarded as reattaching at that time.<sup>4</sup> The majority of the decisions upon the subject, however, support a different conclusion,—one which affirms the lien in such a case to have neither been discharged nor suspended by the sale, but to have continued in force as against all liens subsequent to its original inception, and this whether the redemption was effected by the judgment debtor or by one exercising the right to redeem as the holder of a lien against the property of such debtor.

§ 391. **Payment without Discharge.**—In some cases, of which we shall treat more fully in the chapter upon "Satisfaction," payment of a judgment may be made to the plaintiff without producing the discharge thereof. This

<sup>1</sup> *Ex parte Stevens*, 4 Cow. 133.

<sup>2</sup> *People v. Fleming*, 2 N. Y. 484; *Russell v. Allen*, 10 Paige, 249; *Ex parte Paddock*, 4 Hill, 544; *Freeman v. Jordan*, 17 Ala. 500; *Clayton v. Ellis*, 50 Iowa, 590; *Simpson v. Castle*, 52 Cal. 644; *Black v. Gerichon*, 58 Cal. 56.

<sup>3</sup> *Freeman on Executions*, sec. 317.

<sup>4</sup> *Clayton v. Ellis*, 50 Iowa, 590; *Crosby v. Elkander Lodge*, 16 Iowa, 399; *Escher v. Simmons*, 54 Iowa, 269; *Peckenbaugh v. Cook*, 61 Iowa, 477.

<sup>5</sup> *Settlemire v. Newsom*, 10 Or. 446; *State v. Sherrill*, 34 Ind. 57; *Allen v. McGaughney*, 31 Ark. 252.

happens, as we shall see, when the party making the payment, though compelled to do so for his own protection, or to fulfill some obligation on which he is not primarily liable, is entitled in equity to be invested with some portion or with all the rights previously held by the judgment creditor. Whenever, after payment, the judgment may be kept alive for any purpose, its lien will survive for a like purpose. Thus a party purchasing land of a surety, subject to a judgment against several co-sureties, and who is, for his own protection, compelled to pay plaintiff to avoid the lien, need not thereby discharge the lien on lands held by the other defendants. It becomes the duty of the creditor on such payment to instantly transfer to the payor the judgment and all the securities for its satisfaction. If he refuses to do so, a suit in equity may be maintained to subject the other lands to the payment of a ratable part of the amount which the purchaser has been compelled to pay.<sup>1</sup>

**§ 391 a. The Destruction of Liens by Lapse of Time.**

—The provisions of the statutes of the different states governing the duration of judgment liens are so various that we shall not attempt to make any complete reference to them here. In many of them the time within which judgments operate as liens is designated as a specified number of years from the entry or from the docketing of the judgment, while in others, when the time named in the statute has expired or is about to expire, proceedings may be instituted to revive the judgment and to continue the lien. In some of the states, while the lien is specified as continuing for a certain period of time, its continuance is made to depend upon the plaintiff's taking out execution within specified times, and thereby showing diligence in the attempted collection of his judgment.<sup>2</sup> In Iowa

<sup>1</sup> *Furnold v. Bank of Missouri*, 44 Mo. 336; *Ex parte Crisp*, 1 Atk. 133; *Lathrop and Dale's Appeal*, 1 Pa. St. 512; *Lidderdale v. Robinson*, 12 Wheat. 594.

<sup>2</sup> *Barron v. Thompson*, 54 Tex. 235; *Ficklin v. McCarty*, 54 Tex. 370; *Bassett v. Proetzel*, 53 Tex. 569; *Wylie v. Posey*, 71 Tex. 34.

and North and South Carolina, judgments are liens for ten years after their rendition.<sup>1</sup> In Nebraska and Ohio, lands of a judgment debtor are bound by the lien of judgments against him for the period of five years next after their rendition, and the lien appears to be capable of indefinite continuance, by taking out execution within the five years and every five years thereafter.<sup>2</sup> In Illinois, a judgment of a court of record is a lien, from the time it is rendered or revived, for the period of seven years, and no longer; but if execution is not issued within a year from the time the judgment becomes a lien, it ceases to be a lien; but if it is so issued and levied, and the levy is made thereunder, a sale may take place within one year after the expiration of the seven years, without losing the benefit of the judgment lien.<sup>3</sup> In New York, a judgment docketed in the county clerk's office as required by statute is a lien on the real property and chattels real of the debtor for ten years after the filing of the judgment roll, and no longer; but the time during which the judgment debtor is stayed by an injunction or other order, or by the operation of an appeal, or by express provision of law, from enforcing his judgment is not computed as a part of the ten years.<sup>4</sup>

Applying the rule that the sovereign power is not bound by a statute unless it expressly so declares, it has been held that if a judgment is recovered in favor of a state, the statutes limiting the duration of judgment liens do not apply, and therefore that a judgment continues to be a lien as long as it is capable of being enforced by execution.<sup>5</sup>

In some of the states, the time named in the statute as

<sup>1</sup> McClain's Iowa Ann. Code, sec. 840, secs. 1, 6; *Hastings v. Bryant*, 4099; *Virden v. Shepard*, 72 Iowa, 115 Ill. 69; *Barth v. Commercial Bank*, 546; *Pasour v. Rhyne*, 82 N. C. 149; 115 Ill. 472; *Breed v. Gorham*, 108 Ill. 81.

<sup>2</sup> *Reynolds v. Cobb*, 15 Neb. 378; <sup>4</sup> N. Y. Code Civ. Proc., secs. 1251, 1255.

<sup>3</sup> *Smith and Benedict's Ohio Rev. Stat.*, sec. 5380. <sup>5</sup> *Commonwealth v. Baldwin*, 1 Watts, 54; 26 Am. Dec. 33.

<sup>4</sup> *Hurd's Ill. Rev. Stat.* 1885, p. 1.



the life of judgment liens applies only as against purchasers and encumbrancers, and a judgment continues to be a lien as against the judgment debtor after the expiration of the time designated in the statute.<sup>1</sup>

If the statutes of a state have not provided any limit of the time in which judgment liens continue to operate, they will be held to be operative during the time in which the judgment creditor is entitled to take out execution for the purpose of enforcing his judgment.<sup>2</sup>

§ 391 b. **Releases.**—A release of a judgment lien necessarily results from the satisfaction and extinguishment of the judgment itself. A tender to the judgment creditor of the amount due, if not accepted by him, does not, in the absence of a statute giving it that effect, operate to release the judgment lien.<sup>3</sup> A judgment creditor may doubtless release his lien without satisfying his judgment, either by executing a conveyance of the premises affected by the lien or some part thereof, or indicating in any other manner that he abandons his right to sell the property, or some portion thereof, for the satisfaction of his judgment. If a conveyance is made for the purpose of releasing a judgment lien, but is not recorded, or if recorded is so recorded as not to describe the land intended to be released, a purchaser at an execution sale, relying on the judgment lien, and having no notice of the conveyance to release it, acquires title to the property sold.<sup>4</sup> As between a judgment debtor and a judgment creditor, the latter may release any portion of the land subject to the judgment lien, without losing his right to proceed against other portions.<sup>5</sup> As we shall hereafter

<sup>1</sup> Brown's Appeal, 91 Pa. St. 485; Huteson v. Grubbs, 80 Va. 251; McCahan v. Elliott, 103 Pa. St. 634; Paxton v. Rich, 85 Va. 378.

<sup>2</sup> Fetterman v. Murphy, 4 Watts, 424; People v. Beebe, 1 Barb. 379; Ex parte Peru Iron Co., 7 Cow. 540; Law v. Jackson, 9 Cow. 641; Lincoln Sav. Bank v. Ewing, 12 Lea, 598.

<sup>3</sup> Tufts, 18 Wend. 621.

<sup>4</sup> Huff v. Morton, 83 Mo. 399; Melon's Appeal, 96 Pa. St. 475.

<sup>5</sup> Werdenbaugh v. Reid, 20 W. Va. 588; Shipley v. Pew, 23 W. Va. 487;

<sup>6</sup> Wolfe v. Gardner, 4 Harr. (Del.) 338.

show, equity will often control a judgment creditor by compelling him to satisfy his judgment, if he can do so, by first selling land which has not been sold by the judgment debtor, and upon which there are no junior liens; and in the event that the judgment debtor has sold several parcels of land, will compel sales of the same parcels, if made at all, to be made in an order inverse to that of their alienation.<sup>1</sup> Therefore it would seem that purchasers and encumbrancers under a judgment debtor have equities that a judgment creditor ought not to be allowed to sacrifice, by releasing his lien as to some property and enforcing it as to other property, to their prejudice. One who has purchased lands which are subject to a judgment lien is, by some of the courts, regarded as a surety for the payment of the judgment, and a creditor, having notice of such purchase, who thereafter releases other property or gives up securities for the payment of his debt, is held to have released the lands of such purchaser.<sup>2</sup> Other courts, while they concede that a purchaser of part of the lands subject to a judgment lien has a right to insist that it be satisfied out of the lands retained by the debtor, hold that a creditor is at liberty to release any portion of the lands subject to his lien, unless purchasers from his debtor have given warning that the lands not released are insufficient to satisfy the judgment without the sale of the lands which the debtor has sold to them.<sup>3</sup>

Generally, the lien of a judgment cannot be discharged except by its satisfaction, or by a release given by the judgment debtor, or by some conduct on his part estopping him from enforcing it. Hence a judgment lien may be enforced though a debtor has sold the land subject to it,<sup>4</sup> or has died,<sup>5</sup> or has been adjudged to be a bankrupt,<sup>6</sup> or a

<sup>1</sup> *Post*, sec. 395.

<sup>2</sup> *Barnes v. Mott*, 64 N. Y. 397; 21 Am. Rep. 625; *Ingalls v. Morgan*, 10 N. Y. 178.

<sup>3</sup> *Snyder v. Crawford*, 98 Pa. St. 414.

<sup>4</sup> *Brooker v. Sprague*, 99 Ind. 169.

<sup>5</sup> *Union Bank v. Powell's Heirs*, 3 Fla. 175; 52 Am. Dec. 367; *Durham v. Heaton*, 28 Ill. 264; 81 Am. Dec. 275.

<sup>6</sup> *Doremus v. Walker*, 8 Ala. 194; 42 Am. Dec. 634; *Freeman on Executions*, sec. 207; *Reeser v. Johnson*, 76 Pa. St. 313; *Peck v. Jenness*, 7 How. 612; *McDonald v. Moore*, 8 Ben. 579; *Hudson v. Adams*, 18 Bank. Reg. 102; *Storer v. Haymes*, 18 Bank. Reg. 354; *Shelley v. Elliston*, 18 Bank. Reg. 375; *McCance v. Taylor*, 10 Gratt. 580.

receiver of his estate has been appointed.<sup>1</sup> If a purchaser of land subject to a judgment lien afterward purchases the judgment, he is not estopped from enforcing its payment out of other lands of the judgment debtor.<sup>2</sup>

#### PART V.—EXTENDING AND REVIVING.

§ 392. **Scire Facias.**—The lien of judgments, being generally created and limited by statutes prescribing the period of its duration, is, for the most part, kept strictly within the bounds thus assigned to it. The object of a *scire facias* is, not to extend or to continue the lien, but to enable plaintiff to make it available by execution. Therefore, if the law provides that judgment liens shall continue for a number of years, but that execution can issue only within a shorter period, it may be necessary for the plaintiff to revive his judgment so as to obtain execution after the lapse of this shorter period, and before the expiration of the lien. In case he proceeds to revive his judgment by *scire facias*, this will not prolong the lien beyond the time prescribed by statute.<sup>3</sup> In Ohio, a judgment may become dormant, and thereby lose its lien as against a mortgage made by the debtor during the life of the lien. A revival of the judgment cannot affect the mortgage or any other prior lien.<sup>4</sup> In Arkansas, on the other hand, while the lien of judgments commences on the day of their rendition and continues for three years thereafter, it may be continued by *scire facias* for another period of three years. The lien of the judgment of revivor continues only three years from the issuing of the writ of *scire facias*, and it cannot be prolonged by delaying to enter the judgment of revivor until more than three years after the expiration of the lien of the original judgment. If no *scire facias* issues within three years after the rendi-

<sup>1</sup> *Southern Bank v. Ohio Ins. Co.*, 22 Ind. 181; *Albany C. B. v. Schermerhorn*, 9 Paige, 372; 38 Am. Dec. 551.

<sup>2</sup> *Caley v. Morgan*, 114 Ind. 350.

<sup>3</sup> *Denegre v. Haun*, 13 Iowa, 240; *Tufts v. Tufts*, 18 Wend. 621; *Mower*

*v. Kip*, 6 Paige, 88; 29 Am. Dec. 748; *Whiting v. Beebe*, 12 Ark. 577; *Norton v. Beaver*, 5 Ohio, 180; *Bank v. Wells*, 12 Mo. 384; 51 Am. Dec. 163.

<sup>4</sup> *Tracy v. Tracy*, 5 McLean, 456; *Miner v. Wallace*, 10 Ohio, 403.

tion of a judgment, it may nevertheless be revived, in which event the judgment of revival is a lien only from the day of its entry.<sup>1</sup>

§ 393. **Inability to Execute Process.**—In Tennessee, the impossibility of executing the process of the courts during the late civil war has been urged as a sufficient reason for extending the lien of judgments beyond the period prescribed by statute. This case did not end, as most hard cases are said to do, by making a bad precedent. The court adhered to the law, and declined to relieve the manifest hardship resulting therefrom by judicial legislation.<sup>2</sup>

§ 394. **Stay of Execution by Injunction, Appeal, or Otherwise.**—The remarks made in the preceding section commending the decision in Tennessee as an example of adherence to law when the temptation to judicial legislation was almost irresistible are by no means applicable to several constructions given by the courts to the effect of stays of execution made without the consent of the plaintiff. In Pennsylvania, a statute provided that no judgment should continue to be a lien on the real estate of the debtor during a longer period than five years from the first return day of the term at which such judgment might be entered, unless revived in the manner prescribed by law. Under this it was held that if judgment were rendered with a stay of execution, the lien would continue five years from the *expiration of the stay*.<sup>3</sup> In California, the statute regulating the lien and docketing of judgments in force prior to the adoption of the present Code of Civil Procedure provided "that the lien shall continue for two years, unless the judgment be previously satisfied." At quite an early day the supreme court of the state was called upon to decide whether a stay of execution resulting from filing a sufficient bond for that pur-

<sup>1</sup> *Hershy v. Berman*, 45 Ark. 304.

<sup>2</sup> *Smart v. Mason*, 2 Heisk. 223.

<sup>3</sup> *Pennock v. Hart*, 8 Serg. & R. 369.

pose extended the time during which the lien could continue. The statute, it will be seen, made no exceptions whatever. Notwithstanding the protest of counsel against judicial legislation, and their requesting the court to "not forget that wise old saying of one of the English judges that 'hard cases are the quicksands of the law,'" it was held that the period during which he was tied up by the stay was not to be counted against the judgment creditor. The reasoning employed in the opinion of the court seems, to my mind, rather to show that the legislators ought to have incorporated some exception in the statute, and that they would have done so if their attention had been attracted to the propriety of so doing, than that the language employed by them indicated even an intention to permit of any exceptions. The court said: "The first reading of the act would seem to be conclusive in favor of the appellant; but when we come to examine the legal solecism of allowing a party, by his own motion, thus to defeat the remedy which the law has given the creditor, and to destroy the security furnished, which must inevitably result if the construction contended for be sustained, we are necessarily put upon inquiry as to the intention of the legislature and the possibility of escape from any such absurd consequences. The obvious intention was to charge the estate of the judgment debtor, and to give the creditor two years to make his money. The statute intended that this time should run from the date of the judgment, or period at which the plaintiff was in a situation to take out execution, and pursue his remedy to final satisfaction. By the defendant's own act, the force of that judgment has been suspended, and the lien, which is merely an incident, must share a like fate. It would be absurd to say that a lien attached upon a judgment, and expired by its own limitation while the judgment was still *in fieri*, and could not be prosecuted to full fruition. The defendant would thus be able to abridge, if not destroy, the lien, and in

all cases where a period of more than two years intervened between the date of the judgment in the court below and the final judgment in this court, to substitute personal for that security which the law gives the successful party."<sup>1</sup> This decision and the one cited from the Pennsylvania reports are of the class which Mr. Sedgwick, in his work, says "can hardly fail to bring to the lips of the student the motto of this volume: Great is the mystery of judicial interpretation."<sup>2</sup> They certainly violate the rules laid down by the same author, and by him sustained by the citation of numerous cases: "That if that intention is expressed in a manner devoid of contradiction and ambiguity, there is no room for interpretation or construction, and the judiciary are not at liberty, on consideration of policy or hardship, to depart from the words of the statute; that they have no right to make exceptions or insert qualifications, however abstract justice or the justice of the particular case may require it."<sup>3</sup> The reasoning advanced by Chief Justice Murray, in the opinion from which we have quoted above, in the case of *Dewey v. Latson*, is equally applicable to all cases in which the plaintiff has been prevented by the act of the court or of the defendant from prosecuting his judgment "to full fruition." And the subsequent decisions in the same state exclude from the computation of the time allotted as the life of judgment liens all stays of execution ordered by the court.<sup>4</sup> In Missouri, the fact that an appeal or writ of error is prosecuted and a *superseas* obtained does not prolong the life of judgment liens.<sup>5</sup> If the undertaking on appeal is insufficient in amount to stay proceedings, the lien of the judgment will not be prolonged thereby.<sup>6</sup> Neither can the lien be ex-

<sup>1</sup> *Dewey v. Latson*, 6 Cal. 130; affirmed in *Englund v. Lewis*, 25 Cal. 337.

<sup>2</sup> Sedgwick on Statutory and Constitutional Law, 305.

<sup>3</sup> Sedgwick on Statutory and Constitutional Law, 295.

<sup>4</sup> *Barroilhet v. Hathaway*, 31 Cal. 395; 89 Am. Dec. 193.

<sup>5</sup> *Christy v. Flanagan*, 37 Mo. 670; *Choteau v. Nuckolls*, 20 Mo. 442.

<sup>6</sup> *Gruner v. Weston*, 66 Tex. 209; *Chapin v. Broder*, 16 Cal. 403.

tended by an agreement between the parties to stay execution, nor by any stay not entered of record, that being the only place at which all purchasers are bound to look.<sup>1</sup> A statute of Ohio limited the lien of judgments to one year after their rendition, and provided that in case the judgment was against a principal and surety, the plaintiff should be restrained from proceeding against the latter until the property of the former was exhausted. Under this statute it was decided that though the execution against the surety was delayed by order of the court, the plaintiff lost his lien at the expiration of the year.<sup>2</sup> The plaintiff may be enjoined from enforcing his judgment during either the whole or some portion of the time in which it was operative as a lien; and the injunction may have been procured upon giving a bond with sureties to indemnify plaintiff from loss in the event that the injunction should finally be dissolved or determined to have been improperly issued. There are cases proceeding upon the theory that where the plaintiff, by the injunction bond, acquires a new security upon which he can proceed to obtain satisfaction of his judgment should the injunction be dissolved, the lien of his judgment is at once extinguished.<sup>3</sup> But the better view is, that the issuing of an injunction which is subsequently dissolved does not suspend or destroy a judgment lien.<sup>4</sup> The more difficult question is to determine whether it may not, by suspending the right to issue execution, continue the lien for a period corresponding to such suspension. If the judgment debtor procures the injunction, and thereby prevents the enforcement of the judgment, he is, upon equitable

<sup>1</sup> *Bombay v. Boyer*, 14 Serg. & R. 253; 16 Am. Dec. 494. *Waul*, 44 Tex. 549; *Russell v. McCampbell*, 29 Tex. 31.

<sup>2</sup> *Earnfit v. Winans*, 3 Ohio, 135.

In Indiana an agreement by which execution is stayed has the effect of continuing the duration of the lien: *Applegate v. Edwards*, 45 Ind. 329.

The rule is otherwise in Pennsylvania: *Hemphill v. Carpenter*, 6 Watts, 24; *Wallace's Appeal*, 5 Pa. St. 106; *Betz's Appeal*, 1 Pa. St. 277. See *Ayers v.*

<sup>3</sup> *Bartlett v. Gayle*, 6 Ala. 305; 41 Am. Dec. 52; *Hanley v. Wallace*, 3 B. Mon. 184; *Wood v. Gary*, 5 Ala. 43; *Mansony v. U. S. Bank*, 4 Ala. 750; *Conway v. Jett*, 3 Yerg. 481; 24 Am. Dec. 590.

<sup>4</sup> *Anderson v. Tydings*, 8 Md. 427; 63 Am. Dec. 708; *Murphy v. Cord*, 12 Gill & J. 182; *Smith v. Everby*, 4 How. (Miss.) 178.

principles, not permitted to take advantage of his own wrong, and will not be heard to urge that the lien has been lost by the delay compelled by his writ.<sup>1</sup> If, however, property of the judgment debtor has been sold by him, the lien cannot, as against the purchaser, be prolonged by an injunction issued in a suit to which he was not a party.<sup>2</sup>

§ 394 a. *Sale after Expiration of Lien.*—The time during which judgments have the force of liens on the lands of judgment debtors is usually prescribed by statute. In many instances, executions have been taken out and levies made within the time prescribed for the continuance of the lien, but so late that the sale did not take place until after the lapse of such time. In regard to such cases, so far as our observation has extended, it has, except in the state of Missouri,<sup>3</sup> been uniformly held that the execution and levy did not continue the lien; and that, to preserve the priority acquired by the judgment, the sale must be made during the statutory period. The title acquired at such a sale is therefore precisely the same as though the judgment had never been regarded as a lien.<sup>4</sup> In some of the states the statute controlling judgment liens declares that if an execution is levied within the time designated as the duration of the lien, a sale may be made within one year or some other specified time thereafter. The effect of such a statute is to prolong the judgment lien until the termination of the time allowed for making the sale.<sup>5</sup>

<sup>1</sup> *Lynn v. Gridley*, Walk. (Miss.) 548; 12 Am. Dec. 591.

<sup>2</sup> *Tucker v. Shade*, 25 Ohio St. 355.

<sup>3</sup> *Bank v. Wells*, 12 Mo. 361; 51 Am. Dec. 163; *Durrett v. Hulse*, 67 Mo. 201; *Wood v. Messerly*, 46 Mo. 255.

<sup>4</sup> *Bagley v. Ward*, 37 Cal. 121; 99 Am. Dec. 256; *Isaac v. Swift*, 10 Cal. 71; 70 Am. Dec. 698; *Roe v. Swart*, 5 Cow. 294; *Little v. Harvey*, 9 Wend. 158; *Tufts v. Tufts*, 18 Wend. 621; *Graff v. Kipp*, 1 Edw. Ch. 619; *Pettit*

*v. Shepherd*, 5 Paige, 493; 28 Am. Dec. 437; *Rupert v. Dantaler*, 12 Smedes & M. 697; *Beirne v. Mower*, 13 Smedes & M. 427; *Davis v. Ehrman*, 20 Pa. St. 258; *Birdwell v. Cain*, 1 Cold. 302; *Dickinson's Lessee v. Collins*, 1 Swan, 516; *Shaphard v. Bailleul*, 8 Tex. 26; *Trapnall v. Richardson*, 13 Ark. 543; 58 Am. Dec. 338; *James v. Wortham*, 83 Ill. 69; *Pasour v. Rhyme*, 82 N. C. 149; *Wells v. Bower*, 126 Ind. 115.

<sup>5</sup> *Hastings v. Bryant*, 115 Ill. 69.



§ 395. **Control of Equity over.**—One who has neglected to enforce his judgment lien in proper time will not, in equity, be relieved from the consequences of his neglect.<sup>1</sup> In general, courts of equity will not interpose to take away any advantage which a creditor has obtained by his diligence in securing a judgment lien on the debtor's estate. Thus when a judgment lien has become a charge on the individual real estate of a partner for a firm debt, equity will not displace it in favor of a junior judgment against the same partner for his personal debt. In this case, courts of equity, in the administration of assets, were it not for the judgment lien, would have given the creditors of the individual preference over the creditors of the partnership; or in other words, they would have distributed partnership effects to the creditors of the partnership, and the personal effects of each partner to his personal creditors. But those courts "never interfere where the law has given one class of creditors an absolute preference over the others, but recognize and enforce all antecedent liens, claims, and charges existing on the property according to their priorities."<sup>2</sup> But these rules in no wise impair the authority of courts of equity to prevent judgment creditors from retaining an advantage which they secured through misrepresentation or some other unconscientious and inequitable device. Thus if land be conveyed to trustees for the benefit of creditors, being at the time subject to judgment liens, and the trustees proceed to sell the land, the purchasers may have the creditors enjoined from proceeding to enforce their liens, if they can clearly establish that they were led by the creditors to believe that they would look to the trustees for their claims. In the absence of a clear affirmative showing that the creditors made such representations, they will be allowed the full advantage of their liens.<sup>3</sup>

<sup>1</sup> *Smith v. Meredith*, 30 Md. 429; *Douglas v. Huston*, 6 Ohio, 162; *Sutton v. McKinney*, 82 Va. 46; *McCarty v. Ball*, 82 Va. 872.

<sup>2</sup> *Meech v. Allen*, 17 N. Y. 300; 72 Am. Dec. 465; *Cumming's Appeal*, 25 Pa. St. 268; 64 Am. Dec. 695.

<sup>3</sup> *Doub v. Mason*, 2 Md. 380.

Courts of equity will doubtless interfere to prevent an arbitrary or capricious exercise by judgment creditors of their power to sell the property of their debtors, and will require them to respect the equities of others, when they may do so without impairing their own interests. The lien of a judgment may extend over lands much greater in extent than necessary to its satisfaction. Other persons may have liens upon parts of the same lands, or may have made purchases thereof subject to the judgment lien, or some portion of the land may be exempt from execution, except in satisfaction of a particular judgment lien. Generally, equity will require the judgment creditor to satisfy his claim, so far as he can, without destroying the liens and equities of others. If the debtor has made sales of different parcels of his real estate, the creditor may be required, in proceeding under a writ to satisfy his judgment lien, to first sell such lands as the debtor has not sold, and if further sales remain necessary, then to proceed against the tracts sold by the debtor in an order inverse to that of their alienation.<sup>1</sup> If there are junior liens on some portion of the property, the creditor will also be compelled to satisfy his judgment, if possible, out of lands not subject to such junior liens.<sup>2</sup> If a part of the lands subject to a judgment lien is the homestead of the judgment debtor, he has the right to have the creditor first sell the land not included in the homestead.<sup>3</sup> If, however, there are creditors having junior liens on the non-homestead property, the courts disagree upon the question whether they are entitled to require the creditor to first sell the homestead. We think the better view is,

<sup>1</sup> *Alley v. Rogers*, 19 Gratt. 339; *M. 359*; 47 Am. Dec. 92; *Thompson v. Murray*, 2 Hill Ch. 204; 29 Am. Dec. 630; *Hart v. Ewing*, 12 Lea, 519; *Renick v. Ludington*, 20 W. Va. 511; *Crawford v. Richison*, 101 Ill. 351; *Brengle v. Richardson*, 78 Va. 406; *Merritt v. Richey*, 97 Ind. 236; *Freeman on Executions*, sec. 440; *Olwes v. Dickinson*, 5 Johns. Ch. 235; *Agricultural Bank v. Pullen*, 8 Smedes & M. 359; 47 Am. Dec. 92; *Thompson v. Murray*, 2 Hill Ch. 204; 29 Am. Dec. 630; *Commercial Bank v. Western R. B.*, 11 Ohio, 444; 38 Am. Dec. 739.

<sup>2</sup> *Freeman on Executions*, sec. 440; *Ramsey's Appeal*, 2 Watts, 228; 27 Am. Dec. 301; *Cheeseborough v. Millard*, 1 Johns. Ch. 409; 7 Am. Dec. 494.

<sup>3</sup> *McLaughlin v. Hart*, 46 Cal. 639; *Butler v. Stainback*, 87 N. C. 218.

that the equity of the homestead claimants is superior, and that the homestead must not be sold while other lands remain subject to the judgment lien, though they are also subject to other, but junior, liens.<sup>1</sup>

§ 396. **Transcripts and Abstracts.**—Justices and other inferior courts are, as a general rule, not required to keep judgment dockets for the purposes of creating liens, but judgment creditors are permitted to take steps by which the judgments of these courts become liens, either for the same length of time as though they were judgments of superior courts, or for some other period designated in the statute. To make such judgments operate as liens, a copy, transcript, or abstract thereof is usually required to be filed for record, either with the county clerk or the county recorder, and sometimes to be docketed by the county clerk, either in the same docket used for other judgments, or in a docket kept especially for the docketing of judgments of inferior courts.<sup>2</sup> As the operation of judgment liens is usually confined to the county in which the court was held and in which the judgment docket is kept, provisions are to be found in the statutes of most of the states authorizing a judgment creditor to obtain a copy or transcript of his judgment or of the docketing thereof, and to file or record it in the office of the county clerk or county recorder of other counties in the same state, and thereupon it becomes a lien in such counties, as well as in that in which the judgment was entered.<sup>3</sup> Some statutes provide that transcripts so filed shall become and continue to be liens for a specified time after the filing thereof. When this is the case, the lien thus created sometimes commences, and often continues, after the lien of the original docketing has expired;<sup>4</sup> while in other states the

<sup>1</sup> *Brown v. Cozard*, 68 Ill. 180; *Ray v. Adams*, 45 Ala. 168; *McArthur v. Martin*, 23 Minn. 80; *Ex parte Knox*, 24 S. C. 468; *Foley v. Cooper*, 43 Iowa, 376; *Colby v. Crocker*, 17 Kan. 527. *Contra*, *White v. Polleya*, 20 Wis. 503; 91 Am. Dec. 432; *Myers's Appeal*, 78 Pa. St. 452; *Shelly's Appeal*, 36 Pa. St. 373.

<sup>2</sup> *Laughlin v. Hawley*, 9 Col. 170; *American Ins. Co. v. Gibbon*, 104 Ind. 336; *Hobson v. McCambridge*, 130 Ill. 367.

<sup>3</sup> *Berry v. Reed*, 73 Ind. 235; *Bergen v. State*, 58 Miss. 623.

<sup>4</sup> *Donner v. Palmer*, 23 Cal. 40.

duration of the lien is computed from the rendition of the original judgment.<sup>1</sup> The filing of a transcript in another county does not in any way impair the lien of the judgment in the county in which it was pronounced.<sup>2</sup> The directions of these statutes are generally regarded as mandatory. Therefore no lien can be acquired except upon such judgments as are contemplated by their provisions, nor otherwise than by a substantial compliance with those provisions in every respect.<sup>3</sup>

#### PART VI.

§ 397. **For Advances to be Made.**—A judgment may be taken as an indemnity against contingent liabilities or to secure future advances. An indorser may take judgment to indemnify himself from the consequences which may flow from his indorsement, and may assign the same to another person, who becomes security in his stead. This judgment will, in favor of the substituted security, have precedence over a junior judgment docketed before he was compelled to pay the indorsed notes.<sup>4</sup> A recording act, in substance, declaring that every conveyance not recorded shall be void against any subsequent purchaser in good faith, etc., makes the records notice to subsequent, but not to prior, purchasers or encumbrancers. Therefore, if a judgment is confessed to secure future advances, and a mortgage is subsequently made and recorded on the judgment debtor's real estate, the judgment creditor is not affected thereby, unless charged with actual notice, but may proceed to complete his advances. If the mortgagee wishes to avoid the judgments standing as security for further advances, he should give the judgment creditor actual notice of the mortgage.<sup>5</sup> On the

<sup>1</sup> *Brown v. Wuskoff*, 118 Ind. 569; *Knauss's Appeal*, 49 Pa. St. 419.

<sup>2</sup> *Farmers' Bank v. Heighe*, 3 Md. 357; *Perry v. Morris*, 65 N. C. 221; *Neil v. Colwell*, 66 Pa. St. 216.

<sup>3</sup> *Hobson v. McCambridge*, 130 Ill. 387; *Belbase v. Ratto*, 69 Tex. 636; *Firebaugh v. Ward*, 51 Tex. 409;

*Anthony v. Taylor*, 68 Tex. 403; *Muller v. Boone*, 63 Tex. 94; *Mellon v. Guthrie*, 51 Pa. St. 116; *Brooke v. Phillips*, 83 Pa. St. 183; *Wilson v. Patton*, 87 N. C. 318.

<sup>4</sup> *Norton v. Whiting*, 1 Paige, 578.

<sup>5</sup> *Truscott v. King*, 6 Barb. 348.

other hand, if the lien given to secure advances to be made is a mortgage, the mortgagee is not deemed to have notice of judgments subsequently entered, and therefore is entitled to continue his advances and to hold a paramount lien therefor until he has actual notice of such judgments.<sup>1</sup> In Pennsylvania, and perhaps in South Carolina, one who has taken a judgment or other lien to secure him for advances to be made must take notice of subsequent judgment and other liens duly recorded, and as against them, the lien of his judgment or other security is restricted to advances made before he had notice thereof, whether actual or constructive.<sup>2</sup>

#### PART VII — JUDGMENTS OF FORECLOSURE

§ 398. **Merger of Lien.**—The cases determining the effect of a judgment of foreclosure of a mortgage as a merger or extinguishment of the mortgage lien, though few in number, are irreconcilable in spirit. In New York, a mortgage was foreclosed, but the decree not docketed. On this state of facts, the supreme court held that “this mortgage was merged in the decree entered upon it, which decree was enrolled, but not docketed. The lien of the mortgage was thus extinguished and gone. That a judgment at law extinguishes the debt upon which it is obtained is too plain a proposition to require argument or authority to prove. And I am not able to see why a decree of a court of equity should not have the same effect. Indeed, it seems to me that the rule applies equally in both cases. The decree was not a lien, because it was not docketed.”<sup>3</sup> This part of the decision, though not essential to the determination of the case, and though, so far as we know, not directly affirmed in the same or any other court, seems to have been recognized as correct by the court of appeals of the same state.<sup>4</sup> In Missouri, a

<sup>1</sup> Williams v. Gilbert, 37 N. J. Eq. 84.

<sup>2</sup> Kerr's Appeal, 92 Pa. St. 336; Bank of Montgomery County's Appeal,

36 Pa. St. 170; Walker v. Arthur, 9 Rich. Eq. 397.

<sup>3</sup> People v. Beebe, 1 Barb. 379.

<sup>4</sup> Gage v. Brewster, 31 N. Y. 226.

judgment lien continues for but three years, while the lien of a mortgage does not expire until twenty years. The supreme court of that state considered that a judgment on a debt secured by mortgage, though rendered more than three years, did not cease to be a lien, but might be revived by *scire facias*, and the mortgaged premises subjected to its payment at any time during the twenty years provided as a limit to a mortgage lien.<sup>1</sup> In Iowa, it is well settled that if a judgment or decree is entered, foreclosing a mortgage, the lien of the mortgage continues until the judgment is satisfied or is barred by the statute of limitations;<sup>2</sup> that the lien of the judgment necessarily relates back to the lien of the mortgage has always been the rule in Pennsylvania.<sup>3</sup> The distinction between a decree directing the sale of the mortgaged premises and a statutory judgment docketed for any deficiency which may remain after the sale must be remembered. On the former, execution may at once issue, and to be effective, must necessarily overreach the alienations made subsequent to the mortgage, at least as against all parties to the suit. On the latter, no execution can issue, except against the mortgaged premises, until they have been sold and the amount of the deficiency ascertained. Therefore, they are not generally operative as liens upon the debtor's other property until a judgment has been docketed for the amount of such deficiency.<sup>4</sup>

**§ 399. Decree Including Senior and Junior Mortgage.**—In an action of foreclosure, the holder of a senior mortgage may be made a party defendant; and the decree may be so entered as to require his lien to be first satisfied out of the proceeds of the sale. The purchaser under

<sup>1</sup> *Riley's Adm'r v. McCord's Adm'r*, 21 Mo. 285. See also *Priest v. Wheelock*, 58 Ill. 114.

<sup>2</sup> *Hendershott v. Ping*, 24 Iowa, 134; *Stahl v. Roost*, 34 Iowa, 476.

<sup>3</sup> *De Witt's Appeal*, 76 Pa. St. 283; *McCall v. Lenox*, 9 Serg. & R. 310.

<sup>4</sup> *Bell v. Gilmore*, 25 N. J. Eq. 104; *Winston v. Browning*, 61 Ala. 80; *Hershey v. Dennis*, 53 Cal. 77. In Kansas, however, judgments foreclosing mortgages are liens on the debtor's other property from the date of their rendition: *Lisle v. Cheney*, 36 Kan. 578.

such a decree probably takes title as well by the senior as by the junior mortgage. "He, at all events, acquires such an interest as a court of equity will protect from the lien of a judgment subordinate to the senior and paramount to the junior mortgage, by requiring the judgment creditor, before asserting his lien, to pay the amount of the senior mortgage."<sup>1</sup>

§ 400. **Surplus.** — "The surplus money arising on a sale of land under mortgage foreclosure stands in the place of the land in respect to those having liens or vested rights therein, and the widow of the owner of the equity of redemption is entitled to dower in the surplus, as she was in the land before the sale."<sup>2</sup> After the sale of lands under a mortgage, the mortgagor and persons holding judgment liens against him subordinate to the mortgage have a right of redemption. If the administrator of the mortgagor then sells the latter's interest in the lands, he sells nothing but the equity of redemption, subject both to the mortgage sale and the judgment liens. The holders of the latter, therefore, have no right to have the moneys realized by the administrator treated as real estate subject to their liens, and out of which they are entitled to have their judgments satisfied.<sup>3</sup> If a judgment is not a lien, the judgment creditor has no right to the surplus proceeds of a judicial sale of the debtor's lands, and they must be paid to the latter.<sup>4</sup>

§ 401. **Different Kinds of Decrees.** — The two hundred and forty-sixth section of the Practice Act of California as originally enacted provided that in an action to foreclose a mortgage or other lien "the court shall have power by its judgment to direct a sale of the property, or any part of it, the application of the proceeds to the payment of the amount due on the mortgage, lien, or encumbrance, with costs, and execution for the balance." Under this

<sup>1</sup> *Raymond v. Holborn*, 23 Wis. 57; 99 Am. Dec. 105.

<sup>2</sup> *Mathews v. Duryee*, 45 Barb. 69.

<sup>3</sup> *Sullivan v. Leckie*, 60 Iowa, 326.

<sup>4</sup> *Utley v. Jones*, 92 N. C. 261.

section it was well established by a series of decisions that a definite personal judgment might at once be rendered against the mortgagor, under which the sheriff could make a sale and apply the proceeds, without any proceedings on the part of the court being required to ascertain the deficiency; or the parties were at liberty to take a decree, according to the course pursued under the old chancery system, "adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises and the application of the proceeds to its payment, and apply, after sale, for the ascertainment of any deficiency and execution for the same."<sup>1</sup> A judgment of the first-named kind constituted a lien on the real estate of the defendant from the docketing thereof; but a decree according to the chancery form constituted no lien on the other lands of the debtor. The reasons for holding such a decree not to be a lien were thus stated by the court: "A mere contingent provision referring to no particular amount, and in abeyance until the contingency is determined, is not within the meaning of the statute. It may become a valid and perfect judgment; but until the amount to be recovered is ascertained and fixed, no effect can be given to it as a lien. In the present case the provisions in question were of this character, and no general lien was acquired by the docketing of the judgment. It is no answer to say that the judgments contained a statement of the amount due. There was no personal judgment for this amount, nor was there anything in the nature of a personal judgment, beyond the mere direction for the issuance of an execution in the event of the insufficiency of the mortgaged property to pay the debt. The whole matter was contingent, indefinite, and uncertain, and so long as this continued to be the case, no effect whatever could be given to it."<sup>2</sup>

<sup>1</sup> Rowland v. Leiby, 14 Cal. 156; affirmed in England v. Lewis, 25 Cal. Rollins v. Forbes, 10 Cal. 299; England v. Lewis, 25 Cal. 337. See also similar conclusions expressed in Hays v. Miller, 1 Wash.

<sup>2</sup> Chapin v. Broder, 16 Cal. 403; affirmed in Ter. 143.



§ 402. **Liens Restricted by Statute.**— But the two hundred and forty-sixth section of the Practice Act of California, discussed in the preceding section, was amended in 1861 by the addition of a clause providing that if it be ascertained from the return of the sheriff that a balance is still due to the plaintiff, "the judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debt, and shall, from the time of the docketing thereof, be a lien upon the real estate of the judgment debtor." This section as thus amended has, with a slight change in form, been adopted as the seven hundred and twenty-sixth section of the Code of Civil Procedure. The amendment of 1861 "seems to have been designed to limit the remedy of the mortgage creditor to his security, in cases when a decree for sale of mortgaged premises is had, until that was exhausted, and then to give him a lien on all his debtors' real property subject to execution for the balance remaining due, from the time the same should be duly ascertained and the judgment docketed for that balance." "With respect to a judgment *in personam* coupled with a decree foreclosing a mortgage, and directing a sale of the mortgaged premises, the judgment is to be docketed for the balance which may remain due after the mortgaged property is exhausted, and from that event—that is, the docketing—the judgment shall be a lien on the debtor's real property, and may thereafter subsist as a lien for two years."<sup>1</sup>

PART VIII.—JUDGMENTS IN THE FEDERAL COURTS.

§ 403. **Adoption of State Laws.**— The lien of definite judgments *in personam* in the federal courts is governed by the laws of the state in which the judgment is entered. It must not be supposed from this statement that a state has authority, in virtue of its own sovereignty, to legislate upon this subject, or in any respect to extend or limit the

<sup>1</sup> *Culver v. Rogers*, 28 Cal. 520. The same rule prevails in Nevada: *Weil v. Howard*, 4 Nev. 384.

lien of the judgments or decrees of federal courts. The applicability of state laws arises from their adoption by Congress or by the federal courts, or perhaps by both.<sup>1</sup> The lien of the judgments and decrees of federal courts in the state where entered is the same as that given by law to the judgments of the highest courts of original and general jurisdiction in that state;<sup>2</sup> and they cease in the same manner and at like periods as judgments and decrees in such states.<sup>3</sup> Judgment liens must be created by the government under whose authority the judgment is rendered. The states, therefore, may determine the effect of judgments in their own courts, but not the effect of judgments in the United States courts.<sup>4</sup> A state law requiring judgments to be enrolled in the county where the lands to be charged are situate before becoming liens, therefore, cannot affect the lien of judgments in the federal courts.<sup>5</sup> Though Congress has adopted the laws of the several states, this does not adopt such laws as the state may thereafter enact. Notwithstanding the repeal or modification of the state statute, the execution of the judgments of federal courts remains subject to the control of the statute as it stood when adopted by the United States; and it has been held in at least one of the circuit courts that the Revised Statutes upon this subject are not to be treated as new acts, but rather as a continuation of the former statute.<sup>6</sup>

§ 404. **How State Laws were Adopted.** — In respect to the manner in which the state laws were adopted, a difference of opinion is manifest from the decisions made by

<sup>1</sup> *Clements v. Berry*, 11 How. 411; *United States v. Morrison*, 4 Pet. 124; *Ralston v. Bell*, 2 Dall. 158; *Ward v. Chamberlain*, 2 Black. 438.

<sup>2</sup> *Pollard v. Cocke*, 19 Ala. 188.

<sup>3</sup> *Chouteau v. Nuckolls*, 20 Mo. 442; *Williams v. Benedict*, 8 How. 107; U. S. Rev. Stat., sec. 967; *Myers v. Tyson*, 13 Blatchf. 242.

<sup>4</sup> *Corwin v. Benham*, 2 Ohio St. 38.

<sup>5</sup> *Carroll v. Watkins*, 1 Abb. 474;

*United States v. Halstead*, 10 Wheat. 51; *United States v. Humphries*, 7 Rep. 330; *Cropsey v. Crandall*, 2 Blatchf. 341; *Ward v. Chamberlain*, 2 Black. 430; *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334.

<sup>6</sup> *Myers v. Tyson*, 13 Blatchf. 242. With reference to creditors' bills in state courts in aid of judgments in courts of the United States, see *Tarbell v. Griggs*, 3 Paige, 207; 23 Am. Dec. 790, and note.

judges of federal courts. One view is, — "1. That the lien of judgments in the courts of the United States does not result from any direct legislation of Congress on that subject; 2. That under the judiciary act, which ordains that the laws of the several states shall be rules of decision at common law, the courts of the United States have uniformly adopted the principles of state policy and jurisprudence on the subject of the lien of judgments, so far as the same were applicable, treating them as rules affecting real property and its transmission by descent or purchase."<sup>1</sup> The other view is thus stated by Mr. Justice Clifford in *Ward v. Chamberlain*, 2 Black, 430: "Expressions are to be found in one or more of the cases referred to, which countenance the idea that the state laws in respect to the lien of judgments and decrees were adopted by the courts of the United States"; but upon a closer examination of the subject it will appear, we think, that those laws are recognized and substantially adopted by the "acts of Congress regulating process in the courts of the United States." His honor, after referring to the several acts passed by Congress upon the subject, and especially to the third section of the act of May 19, 1828, which provides "that *writs of execution* and other final process issued on judgments and decrees rendered in *any of the courts of the United States*, and the *proceedings thereon*, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state," adds: "Undoubtedly Congress intended by that provision to adopt the state laws in respect to the proceedings on final process as they existed at the date of the act, and the effect of the enactment, or one of its effects, was to render judgments and decrees for the payment of money rendered in the federal courts a lien on the land of the debtor in all cases and under like circumstances as when rendered in state courts. Under the earlier process acts, this court twice decided that the laws of the states fur-

<sup>1</sup> Lombard & Bayard, 1 Wall. Jr. 196.

nished the rule of decision in respect to the lien of judgments and decrees rendered in the federal courts upon the land of the debtor; and since the passage of the act under consideration it has been twice affirmed by this court as a matter of history that the act was passed to confirm the view expressed in those decisions."<sup>1</sup> On the first day of August, 1888, Congress enacted the following statute, relating to the lien of judgments in the national courts:—

"That judgments or decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever, and only whenever, the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state.

"Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

"Sec. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county or parish in the state of

<sup>1</sup> *Beers v. Haughton*, 9 Pet. 361; *Ross v. Duval*, 13 Pet. 64.

Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county."

§ 405. **Co-extensive with Jurisdiction of Court.**— Even prior to the adoption of the statute referred to in the preceding section, the liens of the judgments of the several courts of the United States attached to all the lands of the judgment debtors situate within the territorial limits of the jurisdiction of the court pronouncing judgment upon which a judgment of like character entered in one of the courts of the state in which such lands are included would have been a lien.<sup>1</sup>

§ 406. **Decrees in Admiralty.**— It seems that until the year 1862 the decree or sentence of a court of admiralty was not supposed to create a lien on the debtor's lands. Mr. Justice Grier, in that year, in a very vigorous dissenting opinion, said: "It is now seventy years since the establishment of courts of admiralty in these states, yet it seems that the boundary of their jurisdiction is not yet settled. During all this time it has never been supposed that the definite sentence or decree of a court of admiralty was a lien or could be levied on lands. The dominion of the admiral was over the sea; the ships and men who frequented it, their contracts and their torts. His court proceeded either against the ship or the owner, by arrest of the thing or the person." But a majority of the court were of the opinion that whatever the practice or understanding of the courts may have been, the terms of the act of 1828 were too broad not to include courts of admiralty. Justice Clifford, in the opinion assented to by a majority of the judges, said: "Courts of justice may construe a

<sup>1</sup> United States v. Duncan, 12 Ill. 523; Trapnall v. Richardson, 13 Ark. 543; 58 Am. Dec. 338; Den v. Jones, 2 McLean, 83; Conrad v. Insurance Co., 1 Pet. 453; Byers v. Fowler, 13 Ark. 276; Sellers v. Corwin, 5 Ohio, 399; 24 Am. Dec. 301, and note; Prevost v. Gorrell, 5 Rep. 616; 12 West. Jur. 369; Lawrence v. Belger, 5 Rep. 532; Branch v. Lowery, 31 Tex. 96; Hall v. Green, 60 Miss. 47; Doyle v. Wade, 23 Fla. 90; 11 Am. St. Rep. 334.

legislative opinion, but they cannot repeal what is expressly enacted. When Congress, in plain and unambiguous terms, declares that writs of executions on decrees rendered *in any of the courts of the United States*, and the proceedings thereupon shall be the same as are now used in the courts of such state, it is not possible for this court to hold that the decrees of one of the courts of the United States are not embraced in that provision; especially not as the very court whose decrees it is said are excluded from the provision is specifically mentioned in the first section of the same act as one of the courts of the United States, and its proceedings there made the subject of special and material regulation. Exclusive original jurisdiction in admiralty and maritime cases is conferred upon the district courts of the United States, but the circuit courts hear such cases on appeal, and, as a matter of daily practice, render decrees therein for the payment of money; and it is not to be doubted, we think, that such decrees are as much within the provisions under consideration as decrees in equity; and if so, no reason is perceived why the same rule should not be applied to decrees of a like character rendered in the district courts.”<sup>1</sup>

<sup>1</sup> Ward v. Chamberlain, 2 Black, 430.

## CHAPTER XV.

## JUDGMENTS AS EVIDENCE.

## PART I.—OF THE MODE OF PROOF.

- § 407. Necessity of record proof.
- § 408. Proof of copies.
- § 409. Judgment-book as evidence.
- § 410. Inferior courts.
- § 411. Authentication of sister states.
- § 412. The certificate.
- § 413. The judge.
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## PART II.—ADMISSIBILITY AND EFFECT.

- § 415. Statement.
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- § 417. Judgment as matter of inducement.
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- § 420. Decrees.

## PART I.—OF THE MODE OF PROOF.

§ 407. **Necessity of Record Proof.**—At common law, “when the existence of a judgment is put in issue upon a plea or replication of *nul tiel record*, it must be proved by the production of the record itself, which is inspected by the court wherein it is, if it be a record of the *same* court; or if of a different court, a *certiorari* must be sued out for bringing it in; and if it be a record of an *inferior* court, the *certiorari* may be issued out of the superior one; but if it be of a *superior* court, or court of *equal* jurisdiction, there is no way to have it but by *certiorari* and *mittimus* out of chancery.”<sup>1</sup> “Exemplifications of the record of a court under the seal of the court are not, in England, common, the usual course being, when the issue is raised as to the existence of a record which does not belong to the same court, to obtain an exemplification under the great

<sup>1</sup> Tidd's Practice, 943; 1 Greenl. Ev., secs. 501, 502.

seal, which cumbrous process consists in the removal of the record of such other court into the court of chancery, and then an exemplification of the record is transmitted by *mittimus* out of chancery to the court where the trial is had, and in which proof of the record is needed."<sup>1</sup>

In some parts of the United States the position is maintained that in the event of the loss or destruction of a judgment roll, it must first be re-established, before it can be admitted in evidence; that a party who wishes to use it in his behalf must take such proceedings in the court where it was made as are necessary to create a new record, and have it substituted in place of the old one.<sup>2</sup> This view is in direct conflict with that expressed by Mr. Greenleaf in his work on evidence, in which he lays down the following rule: "If the *record is lost*, and is ancient, its existence and contents may sometimes be presumed; but whether it be ancient or recent, after proof of the loss, its contents may be proved, like any other document, by any secondary evidence, where the case does not, from its nature, disclose the existence of other and better evidence."<sup>3</sup> In Canada, a defendant in ejectment claimed under a sheriff's deed. He showed that the files, dockets, and all papers of the court had been destroyed by fire, except a fee-book, in which book there was a fee for a judgment entered in a case therein specified. He then proved by parol evidence the rendition and contents of the judgment, and that the sheriff's deed had issued in pursuance of a sale had under such judgment. The admission of this evidence was urged on appeal as an error sufficient to warrant a reversal; but the judge who delivered the opinion of the appellate court, said: "Conceding that matters of record, such as the judgment and writ

<sup>1</sup> Wharton on Evidence, sec. 95.

<sup>2</sup> Walton v. McKesson, 64 N. C. 77.

<sup>3</sup> 1 Greenl. Ev., secs. 84, 509; McQueen v. Fletcher, 4 Rich. Eq. 152. Mr. Greenleaf's rule is, beyond a doubt, sustained by the weight of the authorities: Ames v. Hoy, 12 Cal. 11; In the

Matter of Warfield's Will, 22 Cal. 64; 83 Am. Dec. 49; Stockbridge v. West Stockbridge, 12 Mass. 400; Jackson v. Crawfords, 12 Wend. 533; Newcomb v. Drummond, 4 Leigh, 57; Jackson v. Oullum, 2 Blackf. 228; 18 Am. Dec. 158; Davies v. Pettit, 11 Ark. 349; Mason v. Bull, 26 Ark. 164.



here, should be ordinarily proved by exemplification, yet when the records themselves are proved to be wholly destroyed, it seems simply an impossibility to exemplify them: No doubt there are cases where the courts have ordered a record to be made up from the best materials available, to supply the place of one that was lost; but in the case before us there was nothing on which a record could be made up, and it could hardly be advisable to leave it wholly to the imagination of the clerk of the court to make up a record from an entry in a fee-book."<sup>1</sup>

The authorities are almost unanimous in affirming that if a judgment record is lost, its contents may be proved by the best secondary evidence which can be obtained, and hence may be established by parol;<sup>2</sup> and in some instances, where no direct evidence of its contents can be produced, if the circumstances proved indicate its former existence, its loss may be presumed, and it may further be presumed to have been sufficient to support a sheriff's deed which purports to be made by its authority.<sup>3</sup> But in the absence of the loss or destruction of the record, it cannot be proved otherwise than by the original, or by a duly authenticated copy.<sup>4</sup> But in case of the admitted loss of the original record, no proof of its contents will be received, except the best and most authentic proof which remains susceptible of production.<sup>5</sup>

There are instances in which but a part of a record is relevant, as where the object is to show that a party made certain admissions in a pleading. When such is the case, only that part of the record containing such admission need be offered in evidence; and if more is offered, it

<sup>1</sup> *Heany v. Parker*, 27 U. C. Q. R. 513; citing *Thurston v. Slatford*, Salk. 284; *Roscoe on Evidence*, 10th ed., 93; *Macdougall v. Young, Ryan & M.* 392; *Lansing v. Russell*, 3 Barb. Ch. 325; *Bolan v. Bolan*, 4 Nev. 150; *Graham v. Gordon*, 1 N. Chip. 115; *James v. Kerby*, 29 Ga. 684; *Watson v. Hahn*, 1 Col. 385; *Mason v. Bull*, 26 Ark. 164.

<sup>2</sup> *Foult v. Coburn*, 48 Mo. 230; *Mandeville v. Reynolds*, 68 N. Y. 528;

*Bailey v. Martin*, 119 Ind. 103; *Parry v. Walser*, 57 Mo. 169.

<sup>3</sup> *Ruby v. Van Valkenberg*, 72 Tex. 459.

<sup>4</sup> *State v. Rugan*, 68 Mo. 214; *Rutherford v. Crawford*, 53 Ga. 138; *Tuttle v. Jackson*, 6 Wend. 213; 21 Am. Dec. 306. A record may be proved by the original as well as by copy: *State v. Voight*, 90 N. C. 741.

<sup>5</sup> 1 Greenl. Ev., note to sec. 84.

should be excluded.<sup>1</sup> But if the party offering a record does so in support of a plea of *res judicata*, or to show that he has acquired or his adversary has lost some title or right either by the judgment alone, or by it and proceedings taken for its enforcement, "the whole record, so far as it concerns the formal stages, must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete and is regular, nor can the record be patched with parol."<sup>2</sup> A certificate of the result of the record, by whomsoever made, is not admissible. Hence a certificate, though under the hand of the clerk of a court and attested by its seal, that a divorce was decreed by the court, "as will more fully appear by the record of the proceedings in this office," is inadmissible, because "an official certificate of what is contained in a record, docket, deed, or other instrument is not admissible in evidence, unless made so by statute."<sup>3</sup> Nor can a paper be admitted which is certified to be an extract from the record.<sup>4</sup> An incomplete record of a suit for divorce is not admissible, either to prove a divorce by a court of competent jurisdiction, or that a party thereto "in good faith believed she had been divorced."<sup>5</sup> If the judgment or the judgment and findings are offered in evidence, without producing or offering the other parts of the judgment roll, they must be excluded.<sup>6</sup>

§ 408. *Proof by Copies.* — "As to the proof of records, this is done either by mere production of the records, without more, or by a copy. Copies of the record are:

<sup>1</sup> Wharton on Evidence, sec. 832; McGowan v. Young, 2 Stew. 276.

<sup>2</sup> Wharton on Evidence, sec. 824; Morrill v. Foster, 33 N. H. 379; Davidson v. Murphy, 13 Conn. 213; Smith v. Smith, 22 Iowa, 516; Miles v. Wingate, 6 Ind. 458; Miller v. Deaver, 30 Ind. 371; Mitchell v. Mitchell, 40 Ga. 11; Harper v. Rowe, 53 Cal. 233; Ogden v. Walters, 12 Kan. 282; Mulder v. Rhuman, 62 Ga. 605; Donald v. McKinnan, 17 Fla. 746.

<sup>3</sup> Jay v. East Livermore, 56 Me. 107; Oakes v. Hill, 14 Pick. 442; McGuire v. Sayward, 22 Me. 223; English v. Sprague, 33 Me. 440.

<sup>4</sup> Jay v. East Livermore, 56 Me. 107.

<sup>5</sup> Davis v. Commonwealth, 13 Bush, 318.

<sup>6</sup> Mason v. Wolf, 40 Cal. 246; Mayo v. Brittan, 34 La. Ann. 984; Brown v. Eaton, 98 Ind. 591; Robertson v. Huffman, 92 Ind. 246.

1. Exemplifications; 2. Copies made by an authorized officer; 3. Sworn copies. Exemplifications are either,—  
 1. Under the great seal; or 2. Under the seal of the court where the record remains. In the United States, the great seal being usually, if not always, kept by the secretary of state, an exemplified copy under the seal of the court is usually admitted, even upon an issue of *nul tiel record*, as sufficient evidence.”<sup>1</sup> An *office copy* of the record is made, either by an officer having no other authority than the order of the court directing him to make the copy for the convenience of suitors, or by an officer whose duty it is, by the law, to *furnish copies*. In the first case, the *office copy* is not proof, except in the *same* cause and in the *same* court wherein it was ordered to be made. In the second case, the office copy is equivalent to the record.<sup>2</sup> “The proof of records by an *examined copy* is by producing a witness who has compared the copy with the original, or with what the officer of the court or any other person read as the contents of the record.”<sup>3</sup> Where the examination was made by two persons, one of whom read the record, while the other held the copy, there is some doubt whether it can be admitted without the evidence of both; the one that he read correctly from the original, and the other that the copy corresponded to the original as so read to him, or that they exchanged “papers, and read them alternately both ways.” “The better course, it is ruled, is, either for the comparing witnesses to change hands, so that the listening witness might in his turn become the reading witness, or for either of the two, after the process of comparing, to read the copy with the original, and thus to qualify himself to speak directly to accuracy.”<sup>4</sup>

<sup>1</sup> 1 Greenl. Ev., sec. 501.

<sup>2</sup> 1 Greenl. Ev., sec. 507; Wharton on Evidence, secs. 104, 105, 107; State v. Bartlett, 47 Me. 396; Jay v. Livermore, 56 Me. 106; Hart v. Stone, 30 Conn. 94; Odiorne v. Bacon, 6 Cush. 185; Winters v. Laird, 27 Tex. 616.

<sup>3</sup> See 1 Greenl. Ev., sec. 508, for further rules in relation to proof by copies; and Abbott's Trial Evidence, c. 29.

<sup>4</sup> Wharton on Evidence, sec. 94; citing Slane Peerage Cases, 5 Clark & F. 42.

§ 409. **The Judgment-book**, according to the common-law practice, seems to have been a mere minute or memorandum book, containing, however, no entry which could constitute any evidence of the judgment. The judgment became a permanent record only when the *roll* was brought into court and filed. It could not be proved by mere docket entries.<sup>1</sup> "The minutes from which the record is made up, and even a judgment in paper signed by the master, are not proper evidence of the record."<sup>2</sup> But where, instead of conforming to the common-law system of procedure, the law requires the entry to be made in the judgment-book, and a copy thereof to be made and filed as part of the judgment roll, the entry in the book must be regarded as the formal and permanent record entry, and therefore as evidence of the judgment.<sup>3</sup> The vacature of a judgment must be enrolled or entered of record before it can be given in evidence against the judgment.<sup>4</sup>

§ 410. **Judgments of Inferior Courts.**—"The judgments of inferior courts are usually proved by producing from the proper custody the book containing the proceedings; and as the proceedings in these courts are not usually made up in form, the minutes, or examined copies of them, will be admitted, if they are perfect. If they are not entered in books, they may be proved by the officer of the court, or by any other competent person. In either case, resort will be had to the best evidence to establish the tenor of the proceedings; and therefore, where the course is to record them, which will be presumed until the contrary is shown, the record, or a copy properly authenticated, is the only competent evidence. The caption is a necessary part of the record; and the record itself, or an examined copy, is the only legitimate evidence to

<sup>1</sup> *Brown v. Hathaway*, 10 Minn. 303; *Godefroy v. Jay*, 1 Moore & P. 236.

<sup>2</sup> 1 Greenl. Ev., sec. 508.

<sup>3</sup> *Williams v. McGrade*, 13 Minn. 46. Thus in South Carolina, the entry in

the judgment-book, and not the judgment roll, is the best evidence to prove the judgment: *Harrison v. Manufacturing Co.*, 10 S. C. 278.

<sup>4</sup> *McKnight v. Dunlop*, 4 Barb. 36.

prove it."<sup>1</sup> In an action in Canada on a judgment rendered by a justice of the peace in Michigan, the judgment was proved by introducing the book in which the judgment was recorded, and by proving that the handwriting was that of the justice, and that the witness remembered the rendition of the judgment.<sup>2</sup>

§ 411. **Authentication of Judgments of Other States and of the National Courts.**—The statute of the United States of the 26th of May, 1790, declared "that the records and judicial proceedings of the courts of any state shall be proved and admitted in any court within the United States by the attestation of the clerk, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form."<sup>3</sup> By statute of March 27, 1804, the provisions of the first-named act were extended to the "public acts, records, office-books, judicial proceedings, courts, and officers of the respective territories of the United States, and countries subject to the jurisdiction of the United States." The judgment records of the national courts were held to be admissible when authenticated in the mode prescribed by the statute of 1790,<sup>4</sup> and also when "certified to by the clerk of the court, under the seal of the court, without the certificate of the chief judge."<sup>5</sup> The acts of 1790 and 1804 were re-enacted as section 905 of the Revised Statutes of the United States, which is as follows: "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or

<sup>1</sup> 1 Greenl. Ev., sec. 513.

<sup>2</sup> Kerby v. Elliott, 13 U. C. Q. B. 367.

<sup>3</sup> Ferguson v. Howard, 7 Cranch, 408.

<sup>4</sup> Tooker v. Thompson, 3 McLean, 94; Buford v. Hickman, Hemp. 232.

<sup>5</sup> Wharton on Evidence, sec. 97; citing Turnbull v. Payson, 95 U. S. 418; Redman v. Gould, 7 Blackf. 361; Adams v. Way, 33 Conn. 419; English v. Smith, 26 Ind. 445; Womack v. Dearman, 7 Port. 513.

admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form." Any state may pass a law dispensing with any part of the authentication prescribed by the act of Congress;<sup>1</sup> but no state can require that a judgment be authenticated in a different manner from that provided by Congress.<sup>2</sup>

The judgments which may be authenticated under the acts of Congress are those only which have been pronounced by courts of record, in which classification, however, are included proceedings in chancery, "as well as of orphans' courts and courts of probate."<sup>3</sup> Judgments of justices of the peace may be authenticated when they are regarded as holding courts of record, otherwise they are not entitled to the benefit of these acts.<sup>4</sup>

§ 412. **The Certificate.**—There is nothing in any of the acts of Congress indicating that "in his attestation the clerk may not act by his deputy or under-clerk. The decisions upon the subject, however, are to the effect that the clerk of the court must act personally, and not by his deputy."<sup>5</sup> If the judge is also *ex officio* clerk of the court, he may act in both capacities in attesting the record, and in certifying that the attestation is in due form.<sup>6</sup> If the court has no seal, that fact should be stated in the certificate of the judge or the attestation of the clerk.<sup>7</sup> The copy of the record or judicial proceeding ought to be complete, and not a mere transcript from the minutes or some part thereof.<sup>8</sup> A certificate as follows: "I hereby

<sup>1</sup> Kingman v. Cowles, 103 Mass. 283.

<sup>2</sup> Parke v. Williams, 7 Cal. 247;

Wharton on Evidence, sec. 98; Mo-

Millen v. Lovejoy, 115 Ill. 498.

<sup>3</sup> Wharton on Evidence, sec. 99.

<sup>4</sup> Wharton on Evidence, sec. 99.

<sup>5</sup> Morris v. Patchin, 24 N. Y. 394;

82 Am. Dec. 311; Lothrop v. Blake, 3

Pa. St. 495; Sampson v. Overton, 4

Bibb, 409.

<sup>6</sup> Catlin v. Underhill, 4 McLean, 199;

Ohio v. Hinchman, 27 Pa. St. 484; Low

v. Burrows, 12 Cal. 181; Sally v. Gun-

ter, 13 Rich. 72; Wharton on Evi-

dence, sec. 100.

<sup>7</sup> Cox v. Jones, 52 Ga. 438; Strode v.

Churchill, 2 Litt. 75.

<sup>8</sup> Pepin v. Lachenmeyer, 45 N. Y.

27.

certify that the foregoing is *truly taken* from the record of proceedings of Prince George's county court," and being otherwise in due form and properly attested, was held to be sufficiently certified and attested to entitle it to be received in evidence.<sup>1</sup> A certificate of a clerk certifying the transcript to be a "full, true, and complete transcript of all the proceedings had in the above case as now remains of record and on file in my office," accompanied by the certificate of *the* judge that "the certificate is in due form of law," is a sufficient authentication.<sup>2</sup> And in Pennsylvania a certificate that "the foregoing copy of records is truly taken and correctly copied from the records of judgments of said court remaining in my office" has frequently been taken and presumed to be a copy of the *whole* record.<sup>3</sup> The certificate of the judge that "the certificate is in due form" is conclusive,<sup>4</sup> although the certificate of the clerk itself appears, on inspection, to be manifestly ambiguous and incomplete. If the certificate is complete, "a record will not be rejected because of omissions or excesses in matters irrelevant."<sup>5</sup>

The judge seems to be vested with the power to determine whether the attestation is in due form, and his certificate to that effect is final.<sup>6</sup> It has been determined that the certificate of the judge "must be annexed to the exemplification of the record, and cannot be on a separate piece of paper."<sup>7</sup> "The attestation of the copy must be according to the form used in the state from which the record comes; and it must be certified to be so by the presiding judge of the court, the certificate of the clerk to that effect being insufficient. Nor will it suffice for the

<sup>1</sup> *Ferguson v. Harwood*, 7 Cranch, 408.

<sup>2</sup> *Blair v. Caldwell*, 3 Mo. 353.

<sup>3</sup> *Reber v. Wright*, 68 Pa. St. 471, and cases there cited.

<sup>4</sup> *Grover v. Grover*, 30 Mo. 400.

<sup>5</sup> Wharton on Evidence, sec. 103; *Knapp v. Bell*, 10 Allen, 485; *Clark v. Depew*, 25 Pa. St. 509; 64 Am. Dec. 717; *McCormack v. Deaver*, 22 Md. 187; *Shoun v. Barr*, 11 Ired. 296; *Young v. Chandler*, 13 B. Mon. 252.

<sup>6</sup> *Ferguson v. Harwood*, 7 Cranch, 408; *Tooker v. Thompson*, 3 McLean, 93; *Grover v. Grover*, 30 Mo. 400; *Schoonmaker v. Lloyd*, 9 Rich. 173; *Andrews v. Flack*, 88 Ala. 294. A certificate that the attestation is in proper form has been held sufficient: *White v. Strother*, 11 Ala. 720.

<sup>7</sup> *Norwood v. Cobb*, 20 Tex. 588; *McFarlane v. Harrington*, 2 Bay, 555.

judge simply to certify that the person who attests the copy is the clerk of the court, and that the signature is in his handwriting. The seal of the court must be annexed to the record with the certificate of the clerk, and not to the certificate of the judge.<sup>1</sup> In Illinois it has been held that the judge is not required to state that the person certifying is the clerk, nor that the seal annexed is the seal of the court; that the seal speaks for itself, and is presumed to be attached by the officer charged by law with the custody thereof.<sup>2</sup> If the court whose record is authenticated has no seal, that fact should be stated, either in the certificate of the clerk or in that of the judge.<sup>3</sup>

§ 413. The Judge's Certificate is indispensable.<sup>4</sup> It must appear that the judge who undertakes to attest the record is *the judge* of the court which rendered the judgment. If there are two or more judges, the certificate must be from the chief or presiding judge, and is insufficient if made by an associate judge presiding at a trial, or by a "senior" judge.<sup>5</sup> If the judge who certifies is the only judge of the court, the certificate need not state that he is the "chief judge."<sup>6</sup> The certificate must state that the attestation is in due form. Some of the authorities insist that it must also declare that the clerk who attests is then the clerk of the court.<sup>7</sup> The statute, however, does not require the judge to certify anything except "that the said attestation is in due form." Therefore it seems to us that he should not be required to certify any other fact;<sup>8</sup> nor need there be any certificate from any other officer showing the official capacity of the judge.<sup>9</sup> An

<sup>1</sup> 1 Greenl. Ev., sec. 506.

<sup>2</sup> Ducommun v. Hysinger, 14 Ill. 249.

<sup>3</sup> Craig v. Brown, 1 Pet. C. C. 352; Kirkland v. Smith, 2 Martin, N.S., 497.

<sup>4</sup> Hutchins v. Gerrish, 52 N. H. 205; 13 Am. Rep. 19.

<sup>5</sup> Van Storch v. Griffin, 71 Pa. St. 240; Lathrop v. Blake, 3 Pa. St. 495; Pratt v. King, 1 Or. 49; Settle v. Allison, 8 Ga. 201; 52 Am. Dec. 393; Brown v. Johnson, 42 Ala. 208; Wharton on Evidence, sec. 100.

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<sup>6</sup> State v. Hinchman, 27 Pa. St. 479;

Central Bank v. Veasy, 14 Ark. 672; Keyes v. Mooney, 13 Or. 179.

<sup>7</sup> Wharton on Evidence, sec. 101;

Hutchins v. Gerrish, 25 N. H. 205; 13 Am. Rep. 19; Duvall v. Ellis, 13 Mo.

203; Wilburn v. Hall, 16 Mo. 426; Johnson v. Howe, 2 Stew. 27.

<sup>8</sup> Ducommun v. Hysinger, 14 Ill. 249.

<sup>9</sup> Kinseley v. Rumbough, 96 N. C. 193.



attestation by T. A. J., "presiding judge of the supreme court of the state of New York, in the seventh district, is defective, in not showing him to be judge of the county where the judgment was entered.<sup>1</sup> The authentication must be by the judge, if there is but one. If there are more than one, it must be by the *chief justice* or *presiding judge*.<sup>2</sup> The judge certifying must, *at that time*, be the judge, *chief justice*, or *presiding judge*. Hence where the judges act as chief justice by rotation, the authentication cannot be made by any one of them, but only by the one who, for the time being, is *chief*.<sup>3</sup> If the judge is also *ex officio* clerk of the court, he must certify first as clerk and second as judge, in the same form and substance as when the two offices are not united in one person.<sup>4</sup> If a court ceases to exist, and its records are transferred to another court, the clerk and judge of the latter thereby become proper persons to authenticate the records of the former.<sup>5</sup> Where several judges preside in the same court, neither having any temporary or permanent rank above the others, and all being apparently on a perfect equality with one another, an authentication in which all unite has been regarded as sufficient;<sup>6</sup> and so has an authentication by one only of them, in which he certifies that he is one of the judges, that the authority of each judge is equal, and that each is authorized to certify to a record.<sup>7</sup>

§ 414. **Authentication of Foreign Judgments.** — Foreign judgments are authenticated either, — "1. By an exemplification under the great seal; 2. By a copy proved to be a true copy; 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated." The original judgment record, if offered,

<sup>1</sup> Phelps v. Tilton, 17 Ind. 423.

<sup>2</sup> Stewart v. Gray, Hemp. 94; Van Storch v. Griffin, 71 Pa. St. 240.

<sup>3</sup> Shaw v. Hurd, 3 Bibb, 371.

<sup>4</sup> Catlin v. Underhill, 4 McLean, 199; Duvall v. Ellis, 13 Mo. 203; Bissell v. Edwards, 5 Day, 363; 5 Am. Dec. 166.

<sup>5</sup> Capen v. Emery, 5 Met. 436; Manning v. Hogan, 26 Mo. 570; Darrah v. Watson, 36 Iowa, 116; Thomas v. Tanner, 6 T. B. Mon. 52.

<sup>6</sup> Arnold v. Frazier, 5 Strob. 33.

<sup>7</sup> Bennett v. Bennett, Deady, 300; Orman v. Neville, 14 La. Ann. 392; Andrews v. Flack, 88 Ala. 294.

is also admissible.<sup>1</sup> If all these means are beyond the reach of the party, other and inferior testimony may be received. But a copy of a foreign decree, certified by the signing of a name, with the addition to it of "secretary of state of foreign affairs," with a private seal, is neither sufficient as an authentication nor admissible as secondary evidence.<sup>2</sup> A foreign judgment is sufficiently authenticated when a copy is produced, accompanied by an affidavit stating that the affiant applied to the reputed clerk of the court for a copy of the record of the judgment; that he assisted the clerk in comparing the copy with the record and in affixing the seal of the court to the copy, and saw the same clerk attest the copy by putting his name to it.<sup>3</sup> A record with the attestation of the clerk, with the seal of the court and the certificate of the chief justice that the person attesting the record is the clerk and that his signature is genuine, and with the certificate of the assistant secretary of state of the province, accompanied by that of the governor in charge of the province, attested by the great seal, and certifying that such court is lawfully and duly constituted, and specifying its jurisdiction, and which also verifies the signature of the clerk and of the chief justice, is a sufficient exemplification.<sup>4</sup> The admission of a record of a foreign court is authorized, "if the proceeding has the attestation of the clerk of such court, with the certificate of the chief justice that the person attesting is such clerk and that his signature is genuine, and with the further certificate of the secretary of state, or other officer holding the great seal, purporting that the court is duly constituted, specifying generally the nature of its jurisdiction, and verifying the seal and signature of the clerk and of the chief justice"; and if it be admitted that the person signing as clerk was in fact such clerk, the certificates of

<sup>1</sup> *Sawyer v. Garcelon*, 63 Me. 25.

<sup>2</sup> *Buttrick v. Allen*, 8 Mass. 273; 5 Am. Dec. 105.

<sup>3</sup> *Church v. Hubbard*, 2 Cranch, 187.

<sup>4</sup> *Lazier v. Wescott*, 26 N. Y. 146; 82 Am. Dec. 404.

the chief justice and of the secretary of state are superfluous.<sup>1</sup> A copy of a judgment entered at Havana, signed by the clerk who was keeper of the records of the court, with proof that his signature validated all its proceedings; that the court had no seal; that the seal used to the certificate was that of the royal college of notaries; and that the document is authenticated in the way in which records were commonly authenticated when sent to foreign countries,—was held to be a sufficient exemplification.<sup>2</sup> An authentication of a foreign record by the certificate of the clerk and the presiding judge, aided by “a certificate, under the great seal of the state, of the official character of the judge,” is sufficient to entitle it to be received in evidence.<sup>3</sup> And the rule generally prevailing in the United States is, that “a foreign judgment may be proved by a copy thereof, duly authenticated by the duly authenticated certificate of an officer properly authorized by law to give a copy. The clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in his keeping, and such copies are duly authenticated by his certificate over his official signature, and by the seal of the court. His official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found, affixed to the certificate of the keeper thereof. The great seal proves itself.”<sup>4</sup> Copies of foreign records attested by the seal of the clerk of the court are admissi-

<sup>1</sup> *Capling v. Herman*, 17 Mich. 524.

<sup>2</sup> *Packard v. Hill*, 7 Cow. 434. For further rules in regard to authentication of foreign judgments, see *Greenl. Ev.*, secs. 514, 515, and notes; *Alves v. Bunbury*, 4 Camp. 28; *Cavan v. Stewart*, 1 Stark. 525; *Henry v. Adey*, 3 East, 221; 4 Esp. 228; *Appleton v. Braybrook*, 6 Moore & S. 34; 2 Stark. 6; *Buchanan v. Rucker*, 1 Camp. 63; 9 East, 192; *Loibel v. Stampfer*, 18 L. T., N. S., 720; *Junkin v. Davis*, 22 U. C. B. 369; *Woodruff v. Walling*, 12 U. C. Q. B. 501; *Junkin v. Davis*, 6

U. C. C. P. 408; *Heaketh v. Ward*, 17 U. C. C. P. 190.

<sup>3</sup> *Watson v. Walker*, 23 N. H. 471; *Spaulding v. Vincent*, 24 Vt. 501; *Griswold v. Pitcairn*, 2 Conn. 85; *Thompson v. Stewart*, 3 Conn. 171; 8 Am. Dec. 168; *Stewart v. Suanzy*, 23 Miss. 502.

<sup>4</sup> *Gunn v. Peakes*, 36 Minn. 177; 1 Am. St. Rep. 661; *Mahurin v. Bickford*, 6 N. H. 567; *Dozier v. Joyce*, 8 Port. 303; *Knox v. Silloway*, 10 Ma. 201; *Voss v. Manly*, 19 Me. 331; *Brooks v. Daniels*, 22 Pick. 498; *Day v. Moore*, 13 Gray, 522.

ble, if proved by the copyist.<sup>1</sup> "It has been held that an exemplification may be admitted on proof by an expert of the genuineness of the seal of the court and of the signature of the judge; and when the court has no seal, by proof of the handwriting of the clerk, and of the regularity of the exemplification."<sup>2</sup>

#### PART II.—OF ADMISSIBILITY AND EFFECT OF JUDGMENTS.

§ 415. *Statement.*—In treating, in different parts of this work, upon the various effects directly and indirectly resulting from judgments, and in considering the different persons who are, under the law, bound by judgments as parties or privies thereto, nearly all the questions naturally falling within the second subdivision of this chapter have been already sufficiently noticed. We shall therefore confine the remainder of this chapter to the consideration of those cases in which judgments may properly be admitted in evidence for and against persons neither parties nor privies thereto, nor otherwise bound by the judgment as an estoppel.

§ 416. *To Prove Itself.*—"A judgment may be offered in evidence for two purposes: 1. To establish the mere fact of its own rendition, and those legal consequences which result from that fact; 2. In addition to the first purpose, for the further purpose of proving some other fact as found by that verdict, or upon whose supposed existence the judgment is based." For the first of these purposes every judgment is admissible in evidence against the whole world.<sup>3</sup> Judgments *in rem* are generally considered as admissible against all persons; but their nature

<sup>1</sup> *Pickard v. Bailey*, 26 N. H. 152; *Stewart v. Suansy*, 23 Miss. 592; *Buttrick v. Allen*, 8 Mass. 273; 5 Am. Dec. 105; *Delafield v. Hand*, 3 Johns. 310.

<sup>2</sup> *Wharton on Evidence*, sec. 110; *Owings v. Nicholson*, 4 Har. & J. 66; *Packard v. Hill*, 7 Cow. 434.

<sup>3</sup> Notes 273 and 274 to *Phillipps on Evidence*, by Cowen and Hill; *Williams*

*v. McGrade*, 13 Minn. 46; *Spencer v. Dearth*, 43 Vt. 98; *Harrison v. Harrison*, 39 Ala. 439; *Mortland v. Smith*, 32 Mo. 225; 82 Am. Dec. 128; *Stephens v. Jack*, 3 Verg. 403; 24 Am. Dec. 583; *McCamant v. Roberts*, 66 Tex. 260; *Taylor v. Means*, 73 Ala. 468; *Smith v. Chapin*, 31 Conn. 530; *Maple v. Beach*, 43 Ind. 51; *Pico v. Webster*, 14 Cal. 202; 73 Am. Dec. 647.

and effect will be made the subject of a separate chapter. A judgment may constitute part of a chain of title to real or personal estate, or, though not amounting to title, it may show the character of the possession of one of the parties to a suit. In either case it is admissible in evidence for or against strangers, as well as for or against the parties to the original suit.<sup>1</sup> Whenever a judgment transfers a title, or is the foundation of a claim to possession, it is admissible, upon the same principle, as a voluntary conveyance.<sup>2</sup> If a judgment or decree appoints a receiver or otherwise vests a person with authority to prosecute a suit, or to do some other act, it is always admissible to show his appointment and consequent authority.<sup>3</sup> So if it authorizes a payment to be made, or may otherwise constitute a justification for an act done, it is admissible, though in an action between persons who are neither parties nor privies to it.<sup>4</sup>

§ 417. **As Matter of Inducement.**—Judgments are also available as evidence against third parties by way of inducement, or to prove the existence of any collateral fact.<sup>5</sup> Thus if a principal should be sued for the negligence of his agent, the judgment against him in this suit would be evidence in a suit against the agent by the principal, for the purpose of showing what the consequence of the negligence had been, “as evidence of the *quantum* of damages, though not as to the fact of the injury.”<sup>6</sup> A judgment against a grantee in an action for the possession of land is always evidence against his warrantor, for the purpose of showing an eviction,<sup>7</sup> even where

<sup>1</sup> *Buckingham v. Hannah*, 2 Ohio St. 551; *Barr v. Gratts*, 4 Wheat. 220; *Davis v. Lowndes*, 1 Bing. N. C. 597.

<sup>2</sup> *Fowler v. Savage*, 3 Conn. 90; *Koogler v. Huffmann*, 1 McCord, 495; *Masters v. Varner*, 5 Gratt. 168; 50 Am. Dec. 114; *Cravens v. Jameson*, 59 Mo. 68; *Wharton on Evidence*, sec. 821; *Richardson v. Hobart*, 1 Stew. 500; 18 Am. Dec. 70; *Moon v. Rollins*, 36 Cal. 333; 95 Am. Dec. 181.

<sup>3</sup> *Hardwick v. Hook*, 8 Ga. 354.

<sup>4</sup> *Barkaloo v. Emerick*, 18 Ohio, 268; *State v. Hyde*, 29 Conn. 564; *Plummer v. Harbut*, 5 Iowa, 308; *Davidson v. Peck*, 4 Mo. 438.

<sup>5</sup> *King v. Chase*, 15 N. H. 9; 41 Am. Dec. 675.

<sup>6</sup> *Green v. New River Co.*, 4 Term Rep. 590; 2 Smith's Lead. Cas. 585.

<sup>7</sup> *Booker's Adm'r v. Bell's Ex'r*, 3 Bibb, 175; 6 Am. Dec. 641; *Marlatt v.*

it is not sufficient to prove that such eviction was by paramount title.<sup>1</sup> Where one party agrees to indemnify another for some act done, a judgment rendered against the latter in consequence of such act is evidence against the former for the purpose of showing the damages sustained by the person indemnified.<sup>2</sup> So in an action for contribution between sureties, a judgment in favor of a common creditor, and against the principal debtor and one of the sureties, to which the defendant in the second suit was not a party, is nevertheless competent evidence, not merely of its own rendition, but also by way of inducement to the evidence that the plaintiff in the present suit had discharged the debt on which the former suit was based.<sup>3</sup> A judgment against a sheriff for the default of his deputy is at least *prima facie* evidence against the latter and his sureties to prove that the sheriff had been subjected to the payment of a certain amount of liability.<sup>4</sup> A judgment record may be offered in evidence against an indorser to show with what diligence an action was prosecuted against the maker of a note;<sup>5</sup> or in an action of malicious prosecution, to show that such prosecution terminated in an acquittal.<sup>6</sup> So wherever it is material as part of a cause of action or of defense to show that a party has been acquitted or convicted of an offense, the record showing such acquittal or conviction is admissible.<sup>7</sup> Hence, in an action for malicious prosecution, the conviction of plaintiff is admissible and generally conclusive evidence that such prosecution was not without probable cause;<sup>8</sup> and it is doubtful whether the force of such con-

Clary, 20 Ark. 251; Gragg v. Richardson, 25 Ga. 570; Williams v. Shaw, N. C. Term Rep. 197; 7 Am. Dec. 706; Patton v. Kennedy, 1 A. K. Marsh. 389; 10 Am. Dec. 744.

<sup>1</sup> Rhode v. Green, 26 Ind. 83; Clements v. Collins, 59 Ga. 124; Hardy v. Nelson, 27 Me. 525.

<sup>2</sup> Lee v. Clarke, 1 Hill, 56; Copp v. McDougall, 9 Mass. 1.

<sup>3</sup> Preslar v. Stallworth, 37 Ala. 405; Copp v. McDougall, 9 Mass. 1.

<sup>4</sup> Lewis v. Knox, 2 Bibb, 453; Cox v. Thomas, 9 Gratt. 323.

<sup>5</sup> Lane v. Clark, 1 Mo. 657.

<sup>6</sup> Legatt v. Tollervy, 14 East, 301; Basebe v. Matthews, L. R. 2 Com. P. 684.

<sup>7</sup> Quinn v. Quinn, 17 Vt. 426; Kyle v. State, 10 Ala. 226; Rex v. Waters, 12 Cox C. C. 390.

<sup>8</sup> Adams v. Bicknell, 126 Ind. 210.

viction is for this purpose impaired by the reversal of the judgment or the granting of a new trial.<sup>1</sup> In every instance in which a defendant against whom a judgment has been rendered has the right in turn to recover of some other person, as where a master has been made answerable for the negligence of his servant or agent, such judgment is admissible against the latter, and if paid, is conclusive evidence of the injury suffered by the master, though the servant or agent, if not called upon to defend the former action, may still be at liberty to show that he was not guilty of any negligence.<sup>2</sup>

§ 417 a. **As an Admission.** — A record or judicial proceeding is admissible in evidence in favor of one not a party to it, when it contains a declaration or admission made by the person against whom it is offered. In such circumstances it does not have the unimpeachable verity of a record. It is not conclusive against the person who made the admission or declaration; but such admission or declaration is of no higher dignity than if made in some other manner, and may be explained or rebutted. The affirmative declarations made by a litigant in his pleadings may very properly be received as evidence against him, having at least as much effect as like statements made by him in letters or in ordinary conversation.<sup>3</sup> His mere failure to deny a particular allegation or to interpose any defense whatsoever certainly ought to have far less weight than his affirmative declarations; but it seems that such failure is nevertheless competent evidence in another action, and in favor of a stranger to the former suit, and that a judgment by default is receivable in evidence as an admission of the material facts stated in the complaint.<sup>4</sup>

<sup>1</sup> *Ante*, sec. 319.

<sup>2</sup> *Green v. New River*, 4 Term Rep. 590; *Pritchard v. Hitchcock*, 6 Man. & G. 165.

<sup>3</sup> *Parsons v. Copeland*, 33 Me. 370; 54 Am. Dec. 628; *Williams v. Cheney*, 3 Gray, 215; *Judd v. Gibbs*, 3

Gray, 539; *Greenl. Ev.*, secs. 195, 527 a.

<sup>4</sup> *St. Louis etc. Ins. Co. v. Cravens*, 69 Mo. 72; *Cragin v. Carleton*, 21 Me. 492; *Ellis v. Jameson*, 17 Me. 235. See also *Central R. R. etc. Co. v. Smith*, 76 Ala. 572; 52 Am. Rep. 353.

§ 418. **To Prove that Plaintiff is a Creditor.** — Some conflict of authority exists in regard to the question whether, in a suit to set aside a conveyance by one claiming to be a creditor of the grantor, a judgment in favor of the plaintiff and against the grantor is evidence against the grantee to show that the plaintiff is a *creditor*, as he claims to be. In some instances such a judgment has been rejected because, as to the grantee, it was *res inter alios acta*.<sup>1</sup> But the better opinion, and the one generally adopted, is, that such judgment is *prima facie* evidence against the grantee of the fact of his grantor's indebtedness. "It is not inconsistent with the rule of *res inter alios acta* that a judgment should be taken even against third persons to be what it purports to be till the contrary is shown."<sup>2</sup> Whenever a judgment creditor is proceeding against a third person, and it becomes necessary to show that the judgment debtor was indebted to him, the judgment is at least *prima facie* evidence of that fact.<sup>3</sup> In truth, it is generally much more than *prima facie* evidence. It may be assailed and overthrown by establishing fraud and collusion between the plaintiff and defendant. If not so overthrown, it is received in many states as conclusive evidence of the fact and amount of indebtedness to the judgment creditor as against other creditors or persons claiming under the judgment debtor.<sup>4</sup>

§ 419. **Questions of Public Nature.** — Judgments are also admissible for and against third persons in regard to questions which in general are susceptible of being determined mainly by evidence of common repute; such

<sup>1</sup> *Troy v. Smith*, 33 Ala. 469; *Hartman v. Weiland*, 36 Minn. 223.

<sup>2</sup> *Vogt v. Ticknor*, 43 N. H. 242; *Goodnow v. Smith*, 97 Mass. 69; *Church v. Chapin*, 35 Vt. 231; *Inman v. Mead*, 97 Mass. 310; *Garland v. Kives*, 4 Rand. 282; 15 Am. Dec. 756.

<sup>3</sup> *Rinehey v. Stryker*, 28 N. Y. 45; 84 Am. Dec. 324; *State v. Spikes*, 33 Ark. 801.

<sup>4</sup> *Candee v. Lord*, 2 N. Y. 269; 51

Am. Dec. 294; *Strong v. Lawrence*, 58 Iowa, 56; *Swihart v. Shaum*, 24 Ohio St. 432; *Starr v. Starr*, 1 Ohio, 321; *Marsh v. Pier*, 4 Rawle, 288; 26 Am. Dec. 131; *Walker v. Burrows*, 1 Atk. 94; *Pickett v. Pepkin*, 64 Ala. 520; *Mowry v. Davenport*, 6 Lea, 80; *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527; *Raymond v. Richmond*, 78 N. Y. 354; *Naylor v. Nettler*, 11 Atk. 359.



as questions in regard to customs, tolls, pedigrees, prescription, etc. The solemn adjudication of a court based, as it is presumed to be, upon testimony is properly considered as better proof of a fact than evidence of mere general reputation can be.<sup>1</sup> Because it is competent to prove "by general reputation that a person is dead," a decree which could not have properly been pronounced, except upon proof of the death of a person, has been received as competent evidence of such death.<sup>2</sup> Judgments "are sometimes admissible to prove the existence of a public highway; but never, except where the party claims by prescription, and then, merely to corroborate the presumption of there having been a grant."<sup>3</sup> A, in a suit against C for breaking his close, offered in evidence the record in a like action of A against B, wherein B had pleaded the same defense now claimed by C, namely, a right of public footway, in which A had prevailed. Lord Kenyon said: "The record was admissible evidence, though between other parties, as to the finding upon the right to a public footway, which was negatived."<sup>4</sup> On the trial of an indictment against a town for not repairing an ancient highway, a similar indictment against an adjoining town through which the same highway ran, to which said town had submitted, was admitted as evidence tending to prove that the road was a highway.<sup>5</sup> So in a trial for tolls claimed by prescription, verdicts in other actions against other defendants were admitted, because a recovery against a stranger was at least as good evidence as payment by the stranger would be.<sup>6</sup> Another exception to the rule that judicial records are admissible only for and against the parties thereto exists in the case of an adjudication in regard to the settlement of paupers. If, for instance, it is determined by a competent tribunal that a pauper has his settlement in the town of A, this

<sup>1</sup> *Spencer v. Dearth*, 43 Vt. 98, 104.

<sup>2</sup> *Pile v. McBratney*, 15 Ill. 320.

<sup>3</sup> *Fowler v. Savage*, 3 Conn. 96.

<sup>4</sup> *Reed v. Jackson*, 1 East, 355.

<sup>5</sup> *Regina v. Brightside Bierlou*, 13

Q. B. 933.

<sup>6</sup> *City of London v. Clarke, Carth.*

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determination is *conclusive* against A in a contest with any other town. Such adjudications seem to be *judgments in rem*, and binding on everybody.<sup>1</sup> A judgment is generally admissible in an action between strangers to it to prove any point upon which hearsay is competent evidence. Thus pedigree may be shown by hearsay or by common reputation. Where plaintiff's right to freedom is in question, the court may receive in evidence the judgment in an action between other parties establishing the right of one of plaintiff's ancestors to freedom. This right is of a public nature, capable of proof by common repute, and such repute is as satisfactorily shown by such a judgment as by having witnesses testify what was the common reputation of such ancestor with reference to this right.<sup>2</sup>

In one of the celebrated cases involving the paternity and legitimacy of Myra Clark Gaines, it was necessary to prove that De Grange, at the time he imposed himself in marriage upon her mother, was the husband of another woman; and as tending to show this fact, evidence was given of his prosecution and conviction for bigamy. Respecting the admissibility of evidence of such conviction, the court said: "Before leaving this point, however, we will make a single remark upon what was said in the argument, that if the record of De Grange's conviction had been produced, it would not have been competent testimony, from its being *res inter alios acta*. The general rule certainly is, that a person cannot be affected, much less concluded, by any evidence, decree, or judgment to which he was not actually, or in consideration of law, privy. But the general rule has been departed from so far as that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is evidence also; such as in cases of manorial rights, public rights of way, immemorial custom, disputed boun-

<sup>1</sup> *Dorset v. Manchester*, 3 Vt. 370;    <sup>2</sup> *Vaughan v. Phebe*, 1 Mart. & Y. Gibson v. Nicholson, 2 Serg. & R. 422. 1; 17 Am. Dec. 770.

dary, and pedigrees: *Duchess of Kingston's Case*, 11 How. St. Tr. 261; *Davies v. Lowndes*, 7 Scott N. R. 141; *Doe ex dem. Bacon v. Brydges*, 7 Scott N. R. 333; *Read v. Jackson*, 1 East, 355, per Lawrence, J.; *Brisco v. Lomax*, 8 Ad. & E. 198; *Evans v. Rees*, 10 Ad. & E. 151; *Biddulph v. Ather*, 2 Welsb. H. & G. 23; *Tooker v. Duke of Beauford*, 1 Burr. 146; as to manorial rights: *Brisco v. Lomax*, 8 Ad. & E. 198; as to disputed boundary: *Laybourn v. Crisp*, 4 Mees. & W. 320; as to questions of immemorial custom: *Travers v. Challoner*, Gwill. Tithe Cas. 1237; as to disputed *modus* and pedigree: *Carr v. Heaton*, Gwill. Tithe Cas. 1261. In *Neal and Duke of Athol v. Wilding*, Strange, 1157, the court rejected a special verdict in a former suit, the defendants not having been parties to that suit, which was offered to prove three of the descents which were necessary to make out the duke's pedigree. Mr. Justice Wright differed from the majority of the judges on that occasion, and in Buller's N. P., 4th ed., p. 233, it is said that the opinion of that learned judge was generally approved, though the determination by the rest of the court was contrary. And the point has been since repeatedly ruled in conformity with the opinion of Mr. Justice Wright."<sup>1</sup>

§ 420. Decrees. — "A decree in the court of chancery may be given in evidence on the same footing and under the same limitations as a verdict or judgment of a court of common law."<sup>2</sup>

<sup>1</sup> *Patterson v. Gaines*, 6 How. 598.

<sup>2</sup> *Phillips on Evidence*, 60, and note 278 to same.

## CHAPTER XVI.

## THE ASSIGNMENT OF JUDGMENTS.

- § 421. At common law.
- § 422. May be by parol.
- § 423. Order for proceeds.
- § 424. Partial assignment.
- § 425. Future judgments.
- § 426. Notice of assignment.
- § 426 a. Rights of assignee against assignor.
- § 427. Rights of assignee against defendant.
- § 428. Rights of assignee against third persons.
- § 429. Prior assignment.
- § 430. Assignment by agent.
- § 430 a. Assignor no longer necessary party to actions.
- § 431. Rights passing by the assignment.

§ 421. **At Common Law.** — At common law, the assignment of a judgment or decree did not authorize the assignee to bring an action thereon in his own name,<sup>1</sup> and it has been held that a statute authorizing the assignment of "contracts, express or implied, for the payment of money" did not change the common-law rule respecting the assignment of judgments.<sup>2</sup> If a judgment is founded upon a contract, an action cannot be maintained thereon in the national courts by an assignee, unless it could have been so maintained by the assignor had no assignment been made.<sup>3</sup> But even by the common law "the assignment passes the equitable title, if it is made for a valuable consideration, vesting in the assignee the exclusive right to control the judgment and to use the name of the assignor in the issue of process, or in an original suit on the judgment,"<sup>4</sup> and to receive the proceeds when collected.<sup>5</sup> The effect of an assignment was merely

<sup>1</sup> *Hosack v. Underwood*, 55 Ill. 123; *Wolfe v. Eberlein*, 74 Ala. 99; 49 Am. United States v. Sampersay, Hemp. Rep. 809.  
<sup>2</sup> *Hanks v. Harris*, 29 Ark. 325; *Walker v. Powers*, 104 U. S. 245.  
<sup>3</sup> *Bunnell v. Magee*, 9 Ala. 433; *Edmonds v. Montgomery*, 1 Iowa, 143; *Reid v. Ross*, 15 Ind. 265; *Moore v. Ireland*, 1 Ind. 531.  
<sup>4</sup> *Johnson v. Martin*, 54 Ala. 272; *Haden v. Walker*, 5 Ala. 86; *Forbes v. Tiffany*, 4 Ind. 204.  
<sup>5</sup> *Weir v. Pennington*, 11 Ark. 745.

to transfer an equitable title. To all actions, therefore, having for their object the subjecting of property to the payment of judgments, the assignors were necessary parties, as holders of the legal title.<sup>1</sup> The common-law inhibition preventing the direct assignment and transfer of the legal as well as of the equitable title to judgments is no doubt abolished in a majority of the states of this Union; and its place has been taken by statutes under which it is not merely the privilege but also the duty of the assignee to control and enforce the judgment in his own name.<sup>2</sup>

§ 422. **Form and Mode of Assignment.**— With respect to its assignable qualities, a judgment is governed by the rules applicable to other choses in action; and may be assigned by any person and by any method competent and sufficient for the assignment of any other chose in action. The assignment need not be made under seal.<sup>3</sup> Nor is it indispensable that there should be any *written evidence* of the transfer.<sup>4</sup> The rights of the prevailing party to his judgment may be transferred by a conveyance of the land concerning which the judgment was rendered. Thus the grantee of a plaintiff who has recovered judgment for the possession of real estate, having become the real party in interest, may maintain proceedings to revive the judgment.<sup>5</sup> If an assignment is produced which appears to have been made by one claiming to act as agent of the judgment creditor, his authority to act must be established by the assignee.<sup>6</sup> If an assignment as executed is informal, or contains mistakes in

<sup>1</sup> Elliot v. Waring, 5 T. B. Mon. 239; 17 Am. Dec. 69; Moorer v. Moorer, 87 Ala. 545.

<sup>2</sup> Charles v. Haskins, 11 Iowa, 329; 77 Am. Dec. 148; Moore v. Nowell, 94 N. C. 265; Timberlake v. Powell, 99 N. C. 233; Benne v. Schenko, 100 Mo. 257.

<sup>3</sup> Mitchell v. Hockett, 25 Cal. 538; 85 Am. Dec. 151; Ford v. Stuart, 19 Johns. 342; Beeton v. Ferguson, 22 Ala. 599; Stoddard v. Benton, 6 Col. 508; Dugas v. Matthews, 9 Ga. 510; 54 Am. Dec. 361.

<sup>4</sup> Wood v. Wallace, 24 Ind. 226; Winberry v. Koonce, 83 N. C. 237; Briggs v. Dorr, 19 Johns. 95; Clark v. Moss, 11 Ark. 736; Bartlett v. Yates, 7 Jones, 615; Steele v. Thompson, 62 Ala. 323; 9 Rep. 74. But in Parker v. Bacon, 26 Miss. 425, it was held that an assignment "by delivery" merely was insufficient.

<sup>5</sup> Wright v. Parks, 10 Iowa, 342.

<sup>6</sup> Klemme v. McLay, 68 Iowa, 153.

description or otherwise, or even where no formal assignment is attempted, if the facts proved establish a sale by one party and a purchase by the other, followed by the payment of a consideration satisfactory to the former, the purchaser will, at least in equity, be regarded as the assignee of the judgment;<sup>1</sup> and in many instances persons paying judgments do so under circumstances which constitute them equitable assignees thereof.<sup>2</sup> If a statutory mode of assigning judgments is provided, this does not operate as an inhibition against all other modes of assignment. It is cumulative, and does not prevent a party from making an equitable assignment in any other lawful way; and such assignment, as to all persons having notice thereof, is as effective as the statutory assignment.<sup>3</sup>

No doubt there may be an involuntary or compulsory assignment of a judgment, as where creditors of the judgment creditor proceed against him to obtain satisfaction of their demands; but the mode of such assignment is unsettled. In some of the states it is accomplished by garnishment of the judgment debtor;<sup>4</sup> while in others, title to a judgment may be transferred by a levy and sale under execution against the judgment creditor.<sup>5</sup> In several states the right to garnish a judgment has been denied without determining whether or not it was subject to execution sale.<sup>6</sup>

§ 423. **Order for Proceeds.**—But an assignment, whether unwritten or written, parol or under seal, must indicate

<sup>1</sup> *Frybarger v. Andre*, 106 Ind. 337; *Emory v. Joice*, 70 Mo. 537.

<sup>2</sup> *Post*, secs. 470-473.

<sup>3</sup> *Burgess v. Cave*, 52 Mo. 43; *Adams v. Lee*, 82 Ind. 587. But, in Alabama, a surety paying a judgment, and wishing to enforce it against his principal or co-surety, must obtain an assignment to him "of record," as prescribed by statute: *Blackman v. Joiner*, 81 Ala. 344.

<sup>4</sup> *McBride v. Fallon*, 65 Cal. 301; *Wilson v. Matheson*, 17 Fla. 630; *Sabin v. Cooper*, 15 Gray, 532; *Osborn v. Clark*, 23 Iowa, 104; 92 Am. Dec.

413; *Hanna v. Bry*, 5 La. Ann. 651; 52 Am. Dec. 606; *Righter v. Slidell*, 9 La. Ann. 602.

<sup>5</sup> *Safford v. Maxwell*, 23 La. Ann. 345; *Ochiltree v. Missouri etc. R'y Co.*, 49 Iowa, 150.

<sup>6</sup> *Norton v. Winter*, 1 Or. 47; 62 Am. Dec. 297; *Black v. Black*, 32 N. J. Eq. 75; *Burnham v. Folsom*, 5 N. H. 566; *Shinn v. Zimmerman*, 23 N. J. L. 150; 55 Am. Dec. 280; *Clodfellow v. Cox*, 1 Sneed, 330; 60 Am. Dec. 157; *Trowbridge v. Means*, 5 Ark. 135; 39 Am. Dec. 368; *Freeman on Executions*, secs. 112, 166.

an intention to transfer the title to the property assigned. Therefore an order on the clerk of a court to pay over to A the amount of a judgment held by the drawer is not, even in equity, an assignment. The order cannot, by its terms, become operative until the judgment is extinguished by payment. Therefore it cannot be presumed that an assignment was intended.<sup>1</sup> An order on the judgment debtor to pay a sum less than the judgment is not an assignment. It is a mere evidence of indebtedness on which the payee may sue the drawer, if payment be not made.<sup>2</sup>

§ 424. **Partial Assignment.**—Judgments, like other choses in action, cannot be assigned in part without the assent of the debtors, for the reason that entire demands cannot, against their objection, be split for the purpose of annoying defendants.<sup>3</sup> If at different times a judgment creditor assigns to different persons certain amounts to be paid out of a judgment, and a fund is raised, by the sale of property or otherwise, applicable to the payment of the judgment, the several persons to whom partial assignments were made must, in Pennsylvania, share such proceeds *pro rata*, and not in the order of their respective assignments.<sup>4</sup>

§ 425. **Future Judgments.**—It is no valid objection to an assignment that at the date of its execution no judgment existed. "The assignment carries the whole title to the subject-matter of the action, and, of course, to the judgment, when perfected. As between the parties to the assignment, clearly the whole right passes to the assignee, and the defendant, the moment the judgment is perfected, becomes the debtor of the assignee, and not of the nominal plain-

<sup>1</sup> *Tector v. Abden*, 2 Ind. 183.

<sup>2</sup> *Thomas v. Porter*, 3 Bush, 177. But an order for part of the proceeds of a judgment was held to be an equitable assignment: *Moore v. Robinson*, 35 Ark. 293.

<sup>3</sup> *Love v. Fairfield*, 13 Mo. 300; 53 Am. Dec. 148; *Burnett v. Crandall*, 4 Cent. L. J. 230; *Hopkins v. Stockdale*, 117 Pa. St. 365; *Loomis v. Robinson*, 76 Mo. 488.

<sup>4</sup> *Moore's Appeal*, 92 Pa. St. 309.

tiff.”<sup>1</sup> An assignment of a judgment not yet recovered need not purport to be an assignment of a judgment. Every transfer of an assignable cause of action *pendente lite* has the effect of assigning any judgment subsequently recovered thereon.<sup>2</sup>

“Mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment.”<sup>3</sup> The character of a chose in action is not changed by a verdict.<sup>4</sup> Hence, in an action in tort, though a verdict has been returned in favor of plaintiff, his cause of action remains unassignable, and an attempted assignment thereof, made prior to the rendition of the judgment, is void, and neither transfers the cause of action nor the judgment, when subsequently entered thereon.<sup>5</sup> If, therefore, the plaintiff in an action for malicious prosecution, after obtaining a verdict in his favor, but before the entry of judgment thereon, assigns the *verdict and the cause of action*, such assignment is a nullity. The judgment, when entered, will not belong to the assignee, and may be satisfied by payment to the plaintiff, or to a sheriff holding execution against him.<sup>6</sup> When a judgment is entered the cause of action is merged therein, and loses most of its pre-existing characteristics. Though such cause of action was in tort, the judgment thereon may be assigned at any time after its entry.<sup>7</sup>

§ 426. *Of Notice of Assignment.*—We find the rule laid down in some decisions, in general terms, that “secret assignments cannot be allowed to entrap innocent parties.” This rule, though manifestly of a very equitable character, is, we think, hardly sustained by the reported decisions.

<sup>1</sup> Robinson v. Weeks, 6 How. Pr. 161; Weire v. City of Davenport, 11 Iowa, 49; 77 Am. Dec. 132.

<sup>2</sup> Dugas v. Matthews, 9 Ga. 510; 54 Am. Dec. 361; Wright v. Parks, 10 Iowa, 342.

<sup>3</sup> Comegys v. Vasse, 1 Pet. 213; Hodgman v. Western R. R. Co., 7 How. Pr. 492.

<sup>4</sup> Crouch v. Gridley, 6 Hill, 250;

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Kellogg v. Schnyler, 2 Denio, 73; Ex parte Charles, 14 East, 197.

<sup>5</sup> Rice v. Stone, 1 Allen, 566; Gamble v. Central R. & B. Co., 80 Ga. 595; 12 Am. St. Rep. 276.

<sup>6</sup> Lawrence v. Martin, 22 Cal. 173.

<sup>7</sup> Moore v. Howell, 94 N. C. 265; Charles v. Haskins, 11 Iowa, 329; 77 Am. Dec. 148.



If it is strictly true in any case, it is in regard to the effect of an assignment without notice upon the rights of the judgment debtor. It is undoubtedly true that if the assignee gives no notice of the change of ownership in the judgment, and permits the assignor to control the execution, the judgment debtor will be protected in all payments which he may make to the apparent *judgment creditor*.<sup>1</sup> While it is said that notice of an assignment need not be given directly to the judgment debtor,<sup>2</sup> yet there is no doubt that he is protected in all payments made to the judgment creditor until he has either actual notice of an assignment, or notice of such facts as put him upon inquiry, and are therefore equivalent to actual notice.<sup>3</sup> The fact that an assignment is in writing, filed with the papers in the case, or is on record in some public office in which its recordation is authorized, is not equivalent to actual notice to the judgment debtor.<sup>4</sup> One not a party to a judgment who holds lands subject to the lien thereof is protected in payments made to secure a release of such lien from an assignment of the judgment of which he had no notice.<sup>5</sup> On the other hand, the assignee will be protected from all acts of the parties after notice of the transfer.<sup>6</sup> Even when payment is made before notice of the assignment has been given, it must, to entitle the payor to protection, have been made to the holder of the legal title. Hence, when a judgment has been assigned, the judgment debtor cannot obtain the benefit of a payment subsequently made, by showing that the person to whom he made payment was one for whose benefit the judgment was held in trust by the judgment creditor, and that he neither knew of the assignment nor

<sup>1</sup> *Gaullagher v. Caldwell*, 22 Pa. St. 300; 60 Am. Dec. 85; *Page v. Benson*, 22 Ill. 484; *Dodd v. Brott*, 1 Minn. 270; 66 Am. Dec. 541; *Styles v. McNeil's Heirs*, 6 Martin, N. S., 296; 17 Am. Dec. 183.

<sup>2</sup> *Wilcox v. Morrison*, 9 Lea, 699.

<sup>3</sup> *Noble v. Thompson Oil Co.*, 79 Pa.

St. 354; 21 Am. Rep. 66; *Frissell v. Haile*, 18 Mo. 18.

<sup>4</sup> *Henry v. Brothers*, 48 Pa. St. 70; *Johnson v. Boice*, 40 Ia. Ann. 273; 8 Am. St. Rep. 528.

<sup>5</sup> *Graham v. Evans*, 39 Minn. 382.

<sup>6</sup> *Hughes v. Trahern*, 64 Ill. 48; *Ullman v. Kline*, 87 Ill. 268; *Stoddard v. Benton*, 6 Col. 508.

of the termination of the beneficial interest of the person receiving payment.<sup>1</sup>

The debtor is only protected from the claims of the assignee in cases where he has paid directly to the assignor. Thus cases have arisen, both in New York and in California, under statutes authorizing the garnishment of debtors and the payment by them to the plaintiff in the garnishment, of sums due from them to the defendant therein. In each of these cases it has been decided that a payment made by a debtor after an assignment, and without any notice thereof, would not protect him from the claim of the assignee.<sup>2</sup> The opinion of Johnson, one of the justices of the supreme court of New York, in the case of *Robinson v. Weeks*, 6 How. Pr. 161, contains the most complete statement with which we have met of the grounds upon which these cases were determined. The part disposing of this branch of the case is as follows: Section 393 of the code provides that "after issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be sufficient discharge to the amount so paid."

"The difficulty in the way of the defendant is, that at the time of making these payments to the sheriff, he was not in fact indebted to the judgment debtor whose debts he volunteered to pay. The nominal plaintiff here had at that time no debt or demand against the defendant which he could enforce at law or in equity. It will hardly answer, I think, to say that as he received no notice of the assignment, he had a right to regard himself as the debtor of the plaintiff, and is therefore to be protected. The code, it is true, authorizes a debtor of the judgment debtor to pay the amount of his debt upon any execution

<sup>1</sup> *Seymour v. Smith*, 114 N. Y. 481; 8 How. Pr. 336; *Robinson v. Weeks*, 11 Am. St. Rep. 683. 6 How. Pr. 161; *Richardson v. Ains-*

<sup>2</sup> *Brown v. Ayres*, 33 Cal. 525; 91 Am. Dec. 655; *Countryman v. Boyer*,

worth, 20 How. Pr. 530.

against the latter in the sheriff's hands; but it does not make it his duty to do so. It imposes no obligation on him whatever; and if a party indebted, instead of paying his debt to the person to whom he supposes himself indebted, and where he might learn the true state of the matter, chooses to go and pay another debt, which the law does not require him to pay, and to a person who has no opportunity of knowing whether or not he is really the debtor of the person whose debt he undertakes thus to satisfy, I think he does it at his peril. He must see to it that he pays *his creditor's debt*, or the law will not protect him. He should be regarded as a volunteer, taking the risk of paying the right debt. Had the defendant paid the nominal plaintiff the amount of the judgment and taken his discharge, without notice of the assignment, he would, without doubt, have been protected. Such payment and discharge would have been good against the assignee omitting to give notice of his rights. But the assignee in that case would have had his remedy against such nominal plaintiff by an action for a breach of the implied conditions of the assignment. Here, however, the party assigning has done nothing in violation of the assignment."<sup>1</sup>

§ 426 a. **Rights of Assignee against Assignor.** — By the assignment of a judgment, even though it be "without recourse," the assignor warrants that it is what it purports to be; that he has done and will do nothing to prevent the assignee from collecting it; and that it has not been paid. If the judgment does not belong to the assignor, or is not valid, or has been wholly or partly paid, he is answerable to his assignee, on the warranty implied by the assignment, for the damages resulting from such payment, invalidity, or failure of title,<sup>2</sup> but not for the insolvency of the judgment debtor.<sup>3</sup> If an assign-

<sup>1</sup> For different view, see *Drumm v. v. Hopkins*, 12 Smedes & M. 299; 57 Sherman, 20 La. Ann. 96. Am. Dec. 115; *Johnson v. Boice*, 40

<sup>2</sup> *Miller v. Dugan*, 36 Iowa, 433; La. Ann. 273; 8 Am. St. Rep. 528.

*Furniss v. Ferguson*, 15 N. Y. 437; *Lile*

<sup>3</sup> *Robinson v. White*, 4 Litt. 237.

ment purports to be of the assignor's right, title, and interest in a judgment, without recourse, he cannot be held answerable for payments made thereon of which he had no knowledge.<sup>1</sup> One who makes an assignment of his judgment incurs an obligation to respect his own assignment, and therefore to do no act inconsistent with his changed relation to the judgment. "A party who, after having for a valuable consideration assigned a judgment, satisfies it, clearly incurs a liability to his assignee. If the satisfaction piece is given on payment of the judgment, the money may be recovered by the assignee in an action for money had and received, and if the satisfaction is given without payment, and the assignee is prejudiced thereby, he is entitled to recover against his assignor the damages sustained. In the absence of proof to the contrary, the presumption arising from a satisfaction piece is, that it was given on payment of the judgment."<sup>2</sup>

§ 427. **Rights of Assignee against the Parties.**—The assignee of a judgment receives the same subject to all existing equities between the parties thereto; and it is immaterial whether he had notice of these equities or not.<sup>3</sup> The assignee, by virtue of the assignment, occupies no better a position than the judgment creditor would have occupied, in the absence of any assignment.<sup>4</sup> Hence he cannot deprive the debtor of the benefit of payments made before receiving notice of the assignment, and of the existence of which the assignee was ignorant.<sup>5</sup> The power of the court to set off one judgment against another is not terminated by an assignment. "A purchaser and assignee of a judgment, even for a valuable consideration, and without notice, takes subject to a right

<sup>1</sup> Scofield v. Moore, 31 Iowa, 241.

<sup>2</sup> Booth v. Farmers and Mechanics' Bank, 50 N. Y. 399.

<sup>3</sup> Blakeely v. Johnson, 13 Wis. 530; Scott v. Harkins, 32 Ga. 302; McJilton v. Love, 13 Ill. 486; 54 Am. Dec. 449; Jordan v. Black, 2 Murph. 30; Roberson v. Roberts, 20 Ind. 155; 83 Am. Dec. 308; Rawson v. McJunkins, 27

Ga. 432; Rea v. Forrest, 88 Ill. 275; Stout v. Van Kirk, 10 N. J. Eq. 78; Shelton v. Hurd, 7 R. I. 403; Isett v. Lucas, 17 Iowa, 503; 85 Am. Dec. 672; Mayor of Wetumpka v. Wetumpka W. Co., 63 Ala. 611.

<sup>4</sup> Northam v. Gordon, 23 Cal. 255.

<sup>5</sup> Lattemus v. Garman, 8 Del. Ch. 232.

of set-off existing at the time of the assignment; for an assignee takes subject to all equitable as well as legal defenses which can be urged against the assignor."<sup>1</sup> Where an insolvent judgment defendant recovered a smaller judgment against the plaintiff, it was held that the latter had, *eo instanti*, an equitable right to set off his judgment against it, of which right he could not be defeated by an assignment.<sup>2</sup> However, there are other cases directly antagonistic to those just cited, and which limit the authority to set off one judgment against another, after assignment made, to cases where it can be shown that the assignor was *insolvent* at the time of the assignment of his judgment.<sup>3</sup> The rule sustained by the majority of the authorities upon the subject is, that a set-off will be allowed or refused allowance, as against an assignee of a judgment, as to the court may seem equitable. If the assignment was made to him to avoid the payment of the claim sought to be set off,<sup>4</sup> or with notice of the existence of the right of set-off,<sup>5</sup> or where, because of the "insolvency of the assignor at the time of the assignment, the party claiming the right of set-off had no other means of collecting his debt,"<sup>6</sup> and in all other cases, where the allowance of the set-off will promote substantial justice, the court will enforce the right of set-off, even against an assignee.<sup>7</sup> But if a judgment has been in good faith and for a valuable consideration assigned to a third person before application for a set-off is made, such third person is the real party in interest, and no set-off can ordinarily be allowed.<sup>8</sup>

<sup>1</sup> Porter v. Liscom, 22 Cal. 430; 83 Am. Dec. 76; Hobbs v. Duff, 23 Cal. 596; Graves v. Woodbury, 4 Hill, 559; 40 Am. Dec. 296; Bent v. Pierce, 69 Me. 381; Lockwood v. Bates, 1 Del. Ch. 436; 12 Am. Dec. 121; McBride v. Fallon, 65 Cal. 301; Yorton v. Railroad, 62 Wis. 367; Langston v. Roby, 68 Ga. 406; Neale v. Sullivan, 10 Rich. Eq. 276.

<sup>2</sup> Merrill v. Sonter, 6 Dana, 305.

<sup>3</sup> Henderson v. McVay, 32 Ala. 471; Davis v. Milburn, 3 Iowa, 168.

<sup>4</sup> Duncan v. Bloomstock, 2 McCord, 318; 13 Am. Dec. 728.

<sup>5</sup> Rowe v. Langley, 49 N. H. 395.

<sup>6</sup> Gay v. Gay, 10 Paige, 369.

<sup>7</sup> Hovey v. Morrill, 61 N. H. 9; 60 Am. Rep. 315.

<sup>8</sup> Ulman v. Kline, 87 Ill. 268; Hovey v. Morrill, 61 N. H. 9; 60 Am. Rep. 315; Ames v. Bates, 119 Mass. 397; Zogbaum v. Parker, 55 N. Y. 120; Ramsay's Appeal, 2 Watts, 228; 27 Am. Dec. 301; Williams v. Evans, 2 McCord, 203; Simmons v. Reid, 31 S. C. 389; Ely v. Cooks, 28 N. Y. 365; Gallaher v. Pendleton, 55 Iowa, 142; Bill v. Perry, 43 Iowa, 363.

If an assignee purchases property under a sale upon his execution, he, like the plaintiff purchasing in such cases, is liable to lose his title by a reversal of his judgment.<sup>1</sup> So the fact of the assignment will not prevent a court from vacating a judgment on motion, or granting relief therefrom in equity,<sup>2</sup> or enforcing a compromise made by the judgment creditor prior to the assignment,<sup>3</sup> or refusing to enforce a lien which the assignor could not have enforced.<sup>4</sup> But an assignee is not prejudiced by agreements inconsistent with the face of the judgment. Thus if a party, taking a bond and warrant of attorney, agreeing by a separate instrument not to enter up judgment, nor to have it entered up by any other person, assigns for a valuable consideration, and without notice of the agreement, to a third party, who enters up judgment, this judgment will be held to be good and valid, and unaffected by this secret agreement.<sup>5</sup>

**§ 428. Rights of Assignees against Third Persons. —**

The purchaser of a judgment stands in the same position as the assignee of a note past due. The holder of such a bill "takes it as a dishonored bill, and is affected by all the equities between the original parties, whether he has any notice thereof or not. But when we speak of equities between the parties, it is not to be understood by this expression that all sorts of equities existing between the parties, from other independent transactions between them, are intended, but only such equities as attach to the particular bill, and, as between these parties, would be available to control, qualify, or extinguish any rights arising thereon."<sup>6</sup> "The judgment is property which may be purchased like any other property. The purchaser is bound to inquire into the defenses of the debtor.

<sup>1</sup> *Reynolds v. Harris*, 14 Cal. 667; *Weber v. Tschetter*, 46 N. W. Rep. 76 Am. Dec. 459.

<sup>2</sup> *Haley v. Eureka County Bank*, 20 Nev. 410; *Northam v. Gordon*, 23 Cal. 255; *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216;

<sup>3</sup> *Sutton v. Sutton*, 26 S. C. 33.

<sup>4</sup> *Rider v. Kelso*, 53 Iowa, 367.

<sup>5</sup> *Davis v. Barr*, 9 Serg. & E. 137.

<sup>6</sup> Story on Bills, sec. 220.

He has the means to do this, but he could not be held to inquire into the latent equities existing in the hands of third persons. The law, when it made this sort of property subject to sale, gave it the protection which it extends to all other property. *Between the parties* the assignee of equities stands in the place of his assignor, with no better rights; but *as to the claims of third persons*, the purchaser of an equity stands unaffected by frauds of which he has no knowledge, express or constructive."<sup>1</sup> A judgment was entered and a mortgage recorded on the same day. The judgment creditor agreed with the mortgagee that the lien of the latter should have precedence over the judgment lien. The judgment was subsequently assigned for value, and without notice of this agreement. On this state of facts it was decided that the assignee could not be bound by this nor any other *secret agreement* in favor of one *not a party to the judgment*.<sup>2</sup> The courts of Vermont, differing from nearly if not quite all other courts, enforce against the assignees of judgments all the equities which could be enforced against the assignors, whether in favor of the parties to the judgment or of third persons. Thus in the case of *Downer v. South Royalton Bank*, 39 Vt. 25,<sup>3</sup> the doctrine is asserted and applied that the vendors of choses in action can in no case convey a higher right than they possess; that therefore the vendee, without notice of a judgment held for another, or subject to the equitable rights of another, holds such judgment subordinate to all the equities to which it was subject in the hands of the original plaintiff. If, after notice of the assignment, the defendant pays the judgment to the plaintiff, who thereupon enters satisfaction on the record, the entry may be set aside on application of the assignee.<sup>4</sup>

<sup>1</sup> *Wright & Co. v. Levy*, 12 Cal. 257; *Greene v. Daily*, 5 Mason, 214; *Murray v. Lilburn*, 2 Johns. Ch. 442; *Duke v. Clark*, 58 Miss. 465; *Ritter v. Cost*, 99 Ind. 80; *Miffin Co. Bank's Appeal*, 98 Pa. St. 150; *Ives v. Addison*, 39 Kan. 172; *Garland v. Harrison*, 17 Mo. 282.

<sup>2</sup> *Hendrickson's Appeal*, 24 Pa. St. 363; *Starr v. Hoskins*, 26 N. J. Eq. 414; *Hale v. First Nat. Bank*, 50 Iowa, 642.

<sup>3</sup> See also *De la Vergne v. Evertson*, 1 Paige, 181; 19 Am. Dec. 411.

<sup>4</sup> *Wardell v. Eden*, 2 Johns. Cas. 258.

But in the vacation of such entry, respect should be paid to the rights of third persons acquired while the judgment was discharged of record. If the assignee, after procuring a vacation of the entry of satisfaction, takes out execution, and attempts to enforce it, he will be enjoined from taking proceedings tending to impair the interests of third persons who, acting in good faith, without notice, and after an examination of the records, acquired rights while it appeared by the record that the judgment was discharged.<sup>1</sup>

An assignee is said to be charged with the duty of inspecting the judgment record, and therefore to have notice of all equities which such inspection would disclose.<sup>2</sup> After an assignment is made, a third person cannot by any attachment, garnishment, or other proceeding by or against the assignor, whether voluntary or involuntary, acquire any rights or equities paramount to the assignment.<sup>3</sup>

§ 429. **Prior Assignment.** — “Between two *bona fide* purchasers of a *chose in action* not negotiable, the purchaser first in time is prior in right.” In the purchase of a judgment the rule of *caveat emptor* applies. If the vendor has no title, the vendee can obtain none, though the vendor, once having title, has transferred it without the knowledge of his vendee.<sup>4</sup> This rule is equally applicable whether the second transfer is voluntarily made by the plaintiff or results from a levy and sale under execution.<sup>5</sup> In some of the states, assignments of judgments are required to be recorded; and as between two purchasers *bona fide*, the one who first records his assignment has the better title, irrespective of the date of its acquisition.<sup>6</sup>

<sup>1</sup> Beebe v. Bank of N. Y., 1 Johns. 523.

<sup>2</sup> Griffiths v. Sears, 112 Pa. St. 423.

<sup>3</sup> Robertson v. Segler, 24 S. C. 387; Julian v. Calkins, 85 Mo. 202; Dinamore v. Boyd, 6 Lea, 689.

<sup>4</sup> Mitchell v. Hookett, 25 Cal. 533; 85 Am. Dec. 151; Clarke v. Hogeman, 13 W. Va. 718; Dinamore v. Boyd, 6 Lea, 689.

<sup>5</sup> Fore v. Manlove, 18 Cal. 436.

<sup>6</sup> Campbell's Appeal, 29 Pa. St. 401; 72 Am. Dec. 641.



§ 430. **Transfer by Agent.**—An attorney at law has not, by virtue of his general authority as such, the power to assign his client's judgment.<sup>1</sup> An attorney at law or in fact may be authorized to assign a judgment; and when so authorized, his assignment has the same effect as if made by the judgment creditor personally.<sup>2</sup> But there is no presumption that one who undertook to assign a judgment in favor of another had authority to do so. Hence though he was an officer of the state,<sup>3</sup> or of a private corporation, in whose name he acted,<sup>4</sup> the assignment must be disregarded until his authority to make it is established.

§ 430 a. **An Assignor, Who by his Assignment parts with his interest in the judgment, is no longer a necessary or proper party to proceedings for the purpose of setting it aside, or for the purpose of enjoining or obtaining other relief from it.**<sup>5</sup>

§ 431. **Rights Passing with Assignment.**—An assignment of a judgment which was void because in excess of the jurisdiction of the court has been held to transfer the debt for which the judgment was entered.<sup>6</sup> And it seems that the assignment of a judgment necessarily carries with it the cause of action on which it was based,<sup>7</sup> together with all the beneficial interest of the assignor in the judgment, and all its incidents. The assignee is therefore entitled to the benefit of an appeal bond which, at the time of the assignment, stood as security for the payment of the judgment in the event of its affirmance on an appeal then pending.<sup>8</sup> "It is a familiar rule of equity, of universal application, that the assignment of a demand

<sup>1</sup> *Head v. Gervais*, 1 Walk. (Miss.) 431; 12 Am. Dec. 577; *Clark v. Kingland*, 1 Smedes & M. 256; *Wilson v. Wadleigh*, 36 Me. 496; *Mayer v. Blease*, 4 Rich., N. S., 10; *Maxwell v. Owen*, 7 Cold. 630; *Rice v. Troup*, 62 Miss. 188.

<sup>2</sup> *Emory v. Joice*, 70 Mo. 537; *Caley v. Morgan*, 114 Ind. 350.

<sup>3</sup> *Peacock v. Pembroke*, 8 Md. 348.

<sup>4</sup> *Klemme v. McLay*, 68 Iowa, 158.

<sup>5</sup> *Ritch v. Eichelberger*, 13 Fla. 169.

<sup>6</sup> *Brown v. Scott*, 25 Cal. 189.

<sup>7</sup> *Bolen v. Crosby*, 49 N. Y. 183; *Vila v. Weston*, 33 Conn. 50; *Applegate v. Mason*, 13 Ind. 75; *Burns v. Bangert*, 16 Mo. App. 22.

<sup>8</sup> *Ullman v. Kline*, 87 Ill. 268.

entitles the assignee to every assignable remedy, lien, or security available to the assignor as a means of indemnity or payment, unless expressly excepted or reserved in the transfer of the demand. The assignment of the demand, which is the principal thing, operates as an assignment of all securities for its recovery or collection, and upon such securities the assignee, as the real party in interest, may maintain an action in his own name." Therefore an assignment of a judgment in replevin operates as an assignment of the bond given by the defendant and his sureties to obtain the return of the property to him during the pendency of the action.<sup>1</sup> In Michigan, on the other hand, it has been held that a bond given to a sheriff to obtain the release of attached property, and upon which the plaintiff had the right to maintain an action in the name of that officer, did not pass to the assignee of the judgment the same right.<sup>2</sup> The assignment of a judgment procured by fraud committed on the assignor does not transfer the right of such assignor to have the judgment set aside, or to proceed to recover damages for fraud or deceit. The assignment of the judgment is an affirmation of the judgment by the assignor.<sup>3</sup>

<sup>1</sup> *Schlieman v. Bowlin*, 36 Minn. 198. See also *Timberlake v. Powell*, 99 N. C. 233.

<sup>2</sup> *Forrest v. O'Donnell*, 42 Mich. 556. <sup>3</sup> *Borst v. Baldwin*, 30 Barb. 180.

## CHAPTER XVII.

## OF ACTIONS UPON JUDGMENTS.

- § 432. Of the right to sue upon judgments.
- § 432 a. On judgment against a county.
- § 432 b. Where judgment record is lost.
- § 433. Pendency of appeal.
- § 434. Actions on decrees.
- § 435. Defenses.
- § 436. Judgments procured by attaching property.
- § 437. Action must be in name of legal owner.
- § 438. Right of action does not survive the defendant.
- § 439. Actions against joint defendants.
- § 440. Action does not affect right to execution.
- § 441. Interest.

§ 432. **Of the Right of Action.**—In Connecticut, at a very early date, an action on a judgment was not sustained, because it was deemed unnecessary and vexatious, unless plaintiff succeeded in showing that otherwise he could not have the full effect of his judgment.<sup>1</sup> This position has since been abandoned in the same state; and in its place the true rule has been adopted, that “no other reason” for bringing the action “need be stated in the declaration than that the judgment remains unpaid.”<sup>2</sup> Other courts have exhibited a great aversion to actions upon judgments when no special reason was shown why redress could not be obtained without such actions.<sup>3</sup> Thus in South Carolina and Texas, no action can be maintained upon the judgment of a magistrate’s court until after the expiration of the time in which execution may issue to

<sup>1</sup> *Welles v. Dexter*, 1 Root, 253, decided in 1791. In Lower Canada it has been held that if an action can be brought, under any circumstances, on a judgment in the same court wherein it was rendered, it can only be when the defendant is about to leave the province to defraud his creditors: *Pelliteer v. Freer*, 11 L. C. 199. In

Upper Canada no action lies upon the judgment of the division court: *Donnelly v. Stewart*, 25 U. C. Q. B. 398; affirming *McPherson v. Forrester*, 11 U. C. Q. B. 362.

<sup>2</sup> *Denison v. Williams*, 4 Conn. 402; *Ives v. Finch*, 28 Conn. 112.

<sup>3</sup> *Biddleston v. Whitel*, W. Black. 507.

enforce such judgment.<sup>1</sup> In Oregon, after a full consideration of the authorities, it was, at a comparatively recent date, determined "that the plaintiff cannot claim a strict right to sue his judgment as often as he may choose, without showing any necessity for such a course"; "that neither the common law nor the practice in the various states of the republic, nor anything inherent in the subject, based on sound reason, gives to a judgment creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment."<sup>2</sup> We understand the courts of Kentucky to deny the existence of a right of action on a judgment for the satisfaction of which plaintiff or his assignee can proceed by the ordinary method of execution, levy, and sale.<sup>3</sup> In some other states, actions cannot be prosecuted on domestic judgments until leave of the court is obtained,<sup>4</sup> and the decision of the court either granting or refusing leave is conclusive, unless set aside or reversed, and cannot be questioned in an action on the judgment.<sup>5</sup> In Minnesota, costs are not allowed to the plaintiff in an action on a domestic judgment, "unless such action was brought with previous leave of the court for cause shown."<sup>6</sup>

The objection urged against sustaining a second action while plaintiff has, for the enforcement of the first judgment, every remedy which he could possibly employ to compel the satisfaction of a second judgment, is, that it permits the defendant to be vexed, harassed, and put to costs without conferring any corresponding benefit on the plaintiff. The objection is true in fact, and is doubtless entitled to much weight. It has, nevertheless, been gen-

<sup>1</sup> *Lee v. Giles*, 1 Bail. 449; 21 Am. Dec. 476; *Vandiver v. Hammet*, 4 Rich. 509; *Ligon v. McNiel*, 6 Rich. 377; *Shooter v. McDuffie*, 5 Rich. 61; *Parks v. Young*, 75 Tex. 278.

<sup>2</sup> *Pitzer v. Russel*, 4 Or. 124.

<sup>3</sup> *Smith v. Belmont etc. Iron Co.*, 11 Bush, 390.

<sup>4</sup> *Watts v. Everett*, 47 Iowa, 269; *Matthews v. Davis*, 61 Iowa, 226; *Warren v. Warren*, 84 N. C. 614.

<sup>5</sup> *Warren v. Warren*, 84 N. C. 614; *Kendall v. Briley*, 86 N. C. 56.

<sup>6</sup> *Merchants' Nat. Bank v. Gaalin*, 43 N. W. Rep. 483.

erally overruled. In Kansas, the supreme court, in determining that an action could be sustained in that state on a domestic judgment, said: "The proceeding seems harassing and vexatious, and to serve no purpose that could not be reached by a more simple and less costly method. But these are reasons why the law should be changed, and not that it should be disregarded. When the legislature makes the change, this court will cheerfully enforce the law. The question has been settled under codes similar to our own."<sup>1</sup> The right to bring an action upon a judgment at any time after its rendition, until it is barred by some statute of limitations, though plaintiff retains the power to collect it, if he can, by execution, is almost universally conceded, and such concession has not, so far as we are aware, been attended by any such abuse of the privilege conceded as calls for legislative interposition.<sup>2</sup> Nor is it any defense to an action upon a judgment that an execution has been issued thereon which is still in the officer's hands in full force,<sup>3</sup> and under which he has made a levy upon real property which he has not yet sold.<sup>4</sup>

A judgment may be enforced by action, though the right to take out execution has terminated by lapse of time. Thus in California, where the right to execution continues only five years, and the judgment is liable to

<sup>1</sup> *Burnes v. Simpson*, 9 Kan. 663; citing *Simpson v. Cochran*, 23 Iowa, 81; 92 Am. Dec. 410; *Ames v. Hoy*, 12 Cal. 11.

<sup>2</sup> *Hummer v. Lamphear*, 32 Kan. 439; 49 Am. Rep. 491; *Griffin v. Eaton*, 27 Ill. 379; 81 Am. Dec. 233; *Davidson v. Nebaker*, 21 Ind. 334; 83 Am. Dec. 350; *Hickman v. Macon Co.*, 42 Fed. Rep. 759; *Goodrich v. Colvin*, 6 Cow. 379; *Whelpley v. Nash*, 46 Mich. 25; *White River Bank v. Donner*, 29 Vt. 332; *Whittemore v. Carlin*, 58 N. H. 576; *Becknell v. Becknell*, 110 Ind. 42; *Deidrich v. Nachtsheim*, 33 Wis. 225; *Albin v. People*, 46 Ill. 372; *Stewart v. Peterson*, 63 Pa. St. 230; *Kingsland & Co.*

*v. Forrest*, 18 Ala. 519; 52 Am. Dec. 232; *Gardner v. Henry*, 5 Cold. 458. In Michigan it was held that an action of debt could be sustained on the judgment of the justice of the peace immediately after its rendition, though by statute the execution had been stayed: *McDonald v. Butler*, 3 Mich. 558.

<sup>3</sup> *Hale v. Angel*, 20 Johns. 342; *Smith v. Mumford*, 9 Cow. 26; *Linton v. Hurley*, 114 Mass. 76; *Wilson v. Hatfield*, 121 Mass. 551; *O'Neal v. Kittredge*, 3 Allen, 470; *White River Bank v. Donner*, 29 Vt. 332.

<sup>4</sup> *Boyd v. Mann*, 9 Baxt. 349; *Field v. Sanderson*, 34 Mo. 542; 86 Am. Dec. 124.

be defeated as a cause of action at the end of the same period by a plea of the statute of limitations, it has been held that though an execution may no longer be issued, the plaintiff may still maintain an action on his judgment, if the defendant neglects to plead the statute of limitations against it.<sup>1</sup> If a judgment is dormant in the sense that no execution can properly issue upon it until some proceeding is prosecuted to revive it or to obtain leave to issue execution, it will nevertheless sustain an action founded upon it.<sup>2</sup> The plaintiff may at the same time prosecute an action of debt to recover upon and a *scire facias* to revive his judgment. A judgment in his favor in the latter proceeding does not affect the former. The judgment upon the *scire facias*, and that upon the action on the judgment, become co-existent securities for the same debt. The payment of either satisfies the other.<sup>3</sup> If, however, the right to issue execution has been lost from the lapse of time or the inaction of the plaintiff, who has also lost all means of reviving his judgment so as to become entitled to execution thereon, it has been held that the judgment is so far extinguished that it cannot support an action thereon.<sup>4</sup> When a judgment appears upon the record to be satisfied, but in fact is not, it is doubtful whether any action can be sustained upon it, without first taking some proceeding to vacate the entry of satisfaction. In Vermont and Maine, if a judgment appears to be satisfied by a levy of execution upon real estate, the record must be held conclusive until avoided by some proceeding brought for that purpose, and hence such judgment will not sustain an action;<sup>5</sup> though in the last-named state it was held that an officer's return of satisfaction constituted no defense to an action on the judgment, if, as appeared by his amended return, made at the trial, as well as by other evidence, that what

<sup>1</sup> *Stuart v. Lander*, 16 Cal. 372; 76 Am. Dec. 538.

<sup>2</sup> *Baker v. Hummer*, 31 Kan. 325.

<sup>3</sup> *Carter v. Jones*, 12 Ired. 274.

<sup>4</sup> *Mawhinney v. Doane*, 40 Kan. 676.

<sup>5</sup> *Pratt v. Jones*, 22 Vt. 341; 54 Am. Dec. 80; *Grosvenor v. Chesley*, 48 Me. 369; *Lawrence v. Pond*, 17 Mass. 433.

he received in satisfaction was an unnegotiable town order which had been paid and extinguished before it was so received.<sup>1</sup> In New Hampshire, if an equity of redemption is levied upon, but yields nothing to the judgment creditor, he is not thereby barred from an action on his judgment.<sup>2</sup>

Where a putative father was ordered to pay a specified sum weekly to support a child, it was held that an action of debt would lie to compel the payment of these weekly installments, and that in such action the plaintiff need not show that the child still lives, nor that the weekly allowance is due. These are defenses which, if they exist, the defendant should set up.<sup>3</sup> A judgment, not final, cannot be enforced by action. It must be something more than a mere interlocutory judgment or order.<sup>4</sup>

In Pennsylvania, the orphans' court has authority to distribute estates, to settle the accounts of administrators and guardians, to determine that the sums found to be in the hands of such administrators and guardians shall be paid by them to persons designated in the decrees or orders of the court, and to enforce such payment; but the authority of the court is regarded as special and exclusive, and as depriving the other courts of power to enforce its judgments by actions thereon.<sup>5</sup>

#### § 432 a. Action on a Judgment against a County.—

The object of a judgment against a county is to obtain an audited demand which shall no longer be open to contest. If a statute provides that no person shall, in any case, sue a county unless he has first presented his demand to the board of supervisors for allowance, a judgment creditor of the county must present his judgment to such board and

<sup>1</sup> *Hutchinson v. Greenbush*, 30 Me. 450. & C. 255; *Sheehy v. P. L. A. Co.*, 2 Com. B., N. S., 211; 3 Jur., N. S., 748; 26 L. J. Com. P. 301.

<sup>2</sup> *Whittemore v. Carkin*, 58 N. H. 576. <sup>3</sup> *Black's Ex'r v. Black*, 34 Pa. St. 354; *Ashford v. Ewing*, 25 Pa. St. 213;

<sup>4</sup> *Stokes v. Sanborn*, 45 N. H. 274. <sup>5</sup> *Downer v. Downer*, 9 Watts, 60; *Fry v. Malcolm*, 4 Taunt. 705; *Biddle v. Dowse*, 9 Dowl. & R. 404; 6 Barn. *Leider v. Leider*, 5 Whart. 208.

have it allowed as an audited demand within the time provided by law. On being so allowed, it will stand in the same position and be subject to payment in the same manner as other audited demands. No action can be sustained on such judgment; but if the board of supervisors refuse to allow the judgment when properly presented to them, they may be compelled to do so by a writ of mandate.<sup>1</sup>

§ 432 b. **Lost Record.**—According to some of the authorities, no action can be sustained upon a lost record. The record must first be restored by a direct proceeding for that purpose, “for the reason that if its existence is put in issue, the court passes upon it by an inspection of the record.”<sup>2</sup> But the reason here assigned for the rule is not sound. It is true that when the existence of a record is put in issue, the courts ordinarily determine such issue by inspecting the alleged matter of record. But we think the authorities heretofore cited clearly establish the rule that a record may be proved by parol, when the original is shown to have been lost or destroyed,<sup>3</sup> and we therefore believe that an action ought to be and can be sustained on a lost or destroyed record.<sup>4</sup>

§ 433. **Pending Appeal.**—The pendency of an appeal does not suspend the plaintiff’s right of action upon his judgment, unless the defendant gives a sufficient bond to stay proceedings.<sup>5</sup> In Massachusetts, after appeal, the judgment “no longer, in legal construction, remains in force, and cannot be the foundation of a new action.”<sup>6</sup> The pendency of an appeal cannot be proved by parol evidence.<sup>7</sup> If the defendant brings a writ of error, and the plaintiff brings an action on his judgment and recovers,

<sup>1</sup> Alden v. County of Alameda, 43 Cal. 270.

<sup>2</sup> Foulk v. Colburn, 48 Mo. 230; Walton v. McKesson, 64 N. C. 77.

<sup>3</sup> See *ante*, sec. 407.

<sup>4</sup> Parry v. Walser, 57 Mo. 169; Mandeville v. Reynolds, 68 N. Y. 523.

<sup>5</sup> Taylor v. Shew, 39 Cal. 536; 2 Am. Rep. 478; Suydam v. Hoyt, 25 N. J. L. 230; Faber v. Hoge, 117 Mass. 107; 19 Am. Rep. 398; Woodward v. Carson, 86 Pa. St. 176.

<sup>6</sup> Campbell v. Howard, 5 Mass. 376; Paine v. Cowdin, 17 Pick. 142.

<sup>7</sup> Blodgett v. Jordan, 6 Vt. 580.



he cannot, it is said, sue out execution on his second judgment until the writ of error is determined.<sup>1</sup>

§ 434. **Upon Decrees.**—In the earlier stages of the common law, its courts and judges were not willing to notice the decrees of the courts of chancery, nor to render any assistance in carrying them into effect. They could not therefore be enforced by action.<sup>2</sup> In England, the right of action upon domestic decrees founded on equitable considerations is still denied, on the ground that they can be enforced by appropriate process.<sup>3</sup> But as to foreign and to colonial decrees no such objection exists; and they may, whenever they direct the payment of any sum specified with certainty, be regarded as good considerations for an action of *assumpsit*.<sup>4</sup> In the United States, "we lay it down as a general rule that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more, and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record of the other."<sup>5</sup> The same rules are applicable to actions on the decrees of surrogates.<sup>6</sup> In Rhode Island a decree was entered directing the defendants to pay a specified sum of money, and in default thereof, a commission, appointed by the court, was ordered to sell certain real property. Upon this decree, without

<sup>1</sup> Benwell v. Black, 3 Term Rep. 643.

<sup>2</sup> Williams v. Preston, 3 J. J. Marsh. 600; 20 Am. Dec. 179; Hugh v. Higgs, 8 Wheat. 697.

<sup>3</sup> Carpenter v. Thornton, 3 Barn. & Ald. 52; Henly v. Soper, 8 Barn. & C. 16; 2 Man. & R. 153.

<sup>4</sup> Sadler v. Robins, 1 Camp. 253; Henderson v. Henderson, 6 Ad. & E., N. S., 288; 9 Jur. 755; 13 L. J. Q. B. 274; Henly v. Soper, 8 Barn. & C. 16; 2 Man. & R. 153.

<sup>5</sup> Pennington v. Gibson, 16 How. 65; Post v. Neafie, 3 Caines, 22; Tilford & Co. v. Oakley, Hemp. 197; Nations v. Johnson, 24 How. 203; Evans v. Tatem, 9 Serg. & R. 252; 11 Am. Dec. 717; Warren v. McCarthy, 25 Ill. 95; Mutual L. I. Co. v. Newton, 50 N. J. L. 571; Thrall v. Waller, 13 Vt. 231; 37 Am. Dec. 592; McKim v. Odum, 12 Me. 94.

<sup>6</sup> Dubois v. Dubois, 6 Cow. 494

first making any sale, an action was brought to recover the amount which it directed the defendants to pay. Judgment was rendered in favor of the defendants, for the reason that the decree was in the alternative, and was in the nature of a proceeding *in rem*, not intended to act *in personam*.<sup>1</sup>

§ 435. **Defenses.**— It follows, as a matter of course, from the conclusive effect given to every final adjudication that, to an action upon a judgment or decree, no defense should be entertained which might have been interposed to defeat the original action.<sup>2</sup> Thus no proof can properly be received for the purpose of showing that prior to the entry of the judgment part of the claim was paid;<sup>3</sup> nor in a suit upon a promissory note, given in satisfaction of a judgment, will any evidence be admitted to impeach the consideration for the note by proving that prior to the judgment part of the cause of action was paid.<sup>4</sup> An action upon a recognizance against bail was defended on the ground that the plaintiff in the original suit was persuaded to consent to the judgment against him while in a state of intoxication procured by the plaintiff. This defense was held to be concluded by the former adjudication, on the ground that every matter which might have been urged was finally disposed of by the judgment. But the further defense that the judgment was entered by collusion between the parties to the former action for the purpose of defrauding the bail being made was held to be a good answer in favor of the bail, both at law and in equity.<sup>5</sup> So far as this decision denied the efficacy of the

<sup>1</sup> *Burgess v. Souther*, 15 R. I. 202.  
<sup>2</sup> *Hayward v. Ribbens*, 4 East, 311; *Biddle v. Wilkins*, 1 Pet. 692; *Ellis v. Clarke*, 19 Ark. 420; 70 Am. Dec. 603; *Crawford v. Ex'rs of Simonton*, 7 Port. 110; *Allgood v. Whitley*, 49 Ala. 215; *Bolling v. Anderson*, 1 Tenn. Ch. 127; *Tappan v. Heath*, 16 N. H. 34; *Morris v. Boomer*, 16 Wis. 457; *Ludwick v. Fair*, 7 Ired. 422; 47 Am. Dec. 333; *Taylor v. Harris*, 21 Tex. 438; *Morris v. Curry*, 41 Ark. 75; *Snow v. Mitchell*, 37 Kan. 636; *Noble v. Merrill*, 48 Me. 140; *McAllister v. Singer Mfg. Co.*, 64 Ga. 622; *Bullock v. Ballew*, 9 Tex. 498; *Bridges v. Samuelson*, 73 Tex. 522; *Shupp v. Hoffman*, 72 Md. 359; 21 Am. St. Rep. 476.  
<sup>3</sup> *Stephens v. Howe*, 127 Mass. 164.  
<sup>4</sup> *Bird v. Smith*, 34 Me. 63; 56 Am. Dec. 635.  
<sup>5</sup> *Parkhurst v. Sumner*, 23 Vt. 538; 56 Am. Dec. 94.

defense that the judgment was obtained by intoxication of the defendant, brought about by the plaintiff, its correctness may well be doubted. While the defendant was bound, under ordinary circumstances, to present all his defenses, he ought to have been exonerated from the consequences of any neglect procured and induced by any device of his opponent designed and executed to secure an unconscionable advantage.

To attempt to here state in full the rules of law from which to determine whether a defense pleaded or attempted to be put in evidence in an action on a judgment should be rejected or admitted would involve a reassertion of much that has already been stated in this work. The law of *res judicata* and the law regarding jurisdictional inquiries is as applicable to actions upon judgments as to any other action or proceeding. Hence no defense can be received the maintenance of which must involve a re-examination of issues which were presented on the original action, and either determined by the court or confessed by the defendant. The defendant is as conclusively bound by the decision of any question of law as he is by the finding upon any issue of fact. If the judgment is erroneous, his only remedy is by appeal.<sup>1</sup> One who is proceeded against for his disobedience of an injunction, or of any order of a court, is never permitted to justify his conduct by showing error of the court in making its order or judgment. He must either show that he did not disobey the order, or that the court had no jurisdiction to make it.<sup>2</sup> Because it necessarily involves an attack upon the correctness of a former adjudication, and would tend to encourage infinite litigation, the defendant in an action upon a judgment is never permitted to show that it was procured by perjury.<sup>3</sup> If a judgment is either so irregular that it should be set aside on motion or reversed on

<sup>1</sup> *Bruce v. Cloutman*, 45 N. H. 37; 84 Am. Dec. 111; *Hawes v. Hathaway*, 14 Mass. 233; *Dick v. Tolhaisen*, 4 Hurl. & N. 695.

<sup>2</sup> *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536.

<sup>3</sup> *Demeritt v. Lyford*, 27 N. H. 541; *Cottle v. Cole*, 20 Iowa, 481.

appeal, it is nevertheless valid until so vacated or reversed, and an action may therefore be sustained thereon.<sup>1</sup> Hence it is no defense that a judgment was not entered against defendant by his true or correct name.<sup>2</sup>

At the common law no defense could be received against a judgment not disclosed and supported by the record, though it arose after the judgment was rendered, and might be established without controverting any matter affirmed by the judgment. Hence payment of the judgment was not available as a defense until the satisfaction was entered on the record.<sup>3</sup> At the present time any matter of discharge arising after the entry of a judgment,<sup>4</sup> such as payment, accord and satisfaction,<sup>5</sup> or the release of the debtor by proceedings in bankruptcy or insolvency,<sup>6</sup> may constitute a defense to the judgment, either complete or partial.

Defenses may be interposed in an action upon a judgment, seeking to avoid it on the ground that the defendant did not have an opportunity to present his defense in the former action, or was not properly brought before the court so that it had any right to enter judgment against him. The admissibility of defenses of this character may depend on whether, under the practice sanctioned by the code or other statute of the state in which the question arises, equitable defenses may be interposed to actions at law. In chapter XXII. we shall treat of relief from judgments obtainable by suits in equity. Whenever, under the rules there stated, facts exist such as to require the interposition of a court of equity in an independent suit, the same facts constitute a sufficient defense to an action on a judgment, if, under the code

<sup>1</sup> *Townsend v. Cox*, 45 Mo. 401.

<sup>2</sup> *Mobile & M. R'y Co. v. Yeates*, 67 Ala. 164; *Bloomfield R'y Co. v. Burress*, 82 Ind. 83.

<sup>3</sup> *Briley v. Sugg*, 1 Dev. & B. Eq. 368; 30 Am. Dec. 172.

<sup>4</sup> *Burwell v. Jackson*, 9 N. Y. 535.

<sup>5</sup> *Savage v. Everman*, 70 Pa. St. 315; 10 Am. Rep. 676; *McCullough v.*

*Franklin C. Co.*, 22 Md. 256; *Evans v. Wells*, 22 Wend. 324; *Farmers' Bank v. Groves*, 12 How. 51.

<sup>6</sup> But it is otherwise if the discharge was entered before the judgment was rendered: *Woodbury v. Perkins*, 5 Cush. 86; 51 Am. Dec. 51; *Boun v. Morange*, 108 Pa. St. 69.

of procedure in force where the action is brought, the distinction between legal and equitable proceedings is abolished, or equitable defenses are permitted to be interposed in actions at law. In California, though relief in equity will not be granted on the ground that the court did not have jurisdiction of the defendant, unless he had a good defense in the action in which judgment was entered against him, he may successfully defend an action upon such judgment by establishing such want of jurisdiction.<sup>1</sup> Where, as under the code, law and equity are administered by the same tribunals, and the disposition of the entire controversy between parties in one action is intended to be encouraged, such fraud as would entitle a party to relief from a judgment upon application to chancery constitutes a good defense to an action on such judgment;<sup>2</sup> and this is true in Texas, though the judgment is based upon a just demand.<sup>3</sup> Hence if jurisdiction of the defendant is obtained by false pretensions and misrepresentations, whereby he was induced to go into the state, where process was served upon him, he may successfully defend an action on the judgment founded upon such service,<sup>4</sup> though in some of the states the defense will not be received as sufficient, unless some excuse is offered for not moving, in the original action, to set aside the service of process.<sup>5</sup>

With respect to the defense of want of jurisdiction, it has been said that a judgment such as the court was competent to pronounce "cannot, in an action therein in our courts, be imperiled by a citizen or foreigner, by averment and proof that the court had not jurisdiction of the per-

<sup>1</sup> *Hill v. City Cab Co.*, 79 Cal. 188.

<sup>2</sup> *Rogers v. Gwinn*, 21 Iowa, 58; *Dobson v. Pearce*, 12 N. Y. 156; 62 Am. Dec. 152; *Keeler v. Elston*, 22 Neb. 310; *Carnel v. Wilson*, 3 Litt. 80; *Whetstone v. Whetstone*, 31 Iowa, 276; *Clark v. Little*, 41 Iowa, 499; *Mandeville v. Reynolds*, 68 N. Y. 523.

<sup>3</sup> *Drinkard v. Ingram*, 21 Tex. 650; 73 Am. Dec. 250.

<sup>4</sup> *Dunlap v. Cody*, 31 Iowa, 260; 7 Am. Rep. 129; *Duringer v. Moschino*, 93 Ind. 495.

<sup>5</sup> *Peel v. January*, 35 Ark. 331; 37 Am. Rep. 27.

fully disclosed. It is not sufficient to state that the judgment was obtained by the fraud and covin of the plaintiff: *Hopkins v. Woodward*, 75 Ill. 62.

<sup>3</sup> *Drinkard v. Ingram*, 21 Tex. 650; 73 Am. Dec. 250.

<sup>4</sup> *Dunlap v. Cody*, 31 Iowa, 260; 7 Am. Rep. 129; *Duringer v. Moschino*, 93 Ind. 495.

<sup>5</sup> *Peel v. January*, 35 Ark. 331; 37 Am. Rep. 27.

But where an equitable defense is sought to be interposed, it must be

son of the defendant.”<sup>1</sup> But if the court did not have jurisdiction, it was not competent to pronounce any judgment. Whether a judgment is void or not must be determined from pursuing such jurisdictional inquiries as are permitted under the rules stated in chapter VIII. If found to be void, no recovery thereon will be permitted;<sup>2</sup> but if not void in the extreme sense of the term, defects in the service of process,<sup>3</sup> or the want of such service, cannot be shown in an action at law, except in those states where it is allowable as an equitable defense.<sup>4</sup>

If an action is prosecuted on a judgment for the purpose of affecting third persons, the principles stated in chapter XIII. concerning the impeachment of judgments are applicable. Whenever, by proceedings in *scire facias* or by action, a judgment is sought to be used to the detriment of a third person, he may avoid its effect by showing that the plaintiff and defendant in the former action colluded together, and thereby procured the judgment for the purpose of defrauding him.<sup>5</sup>

§ 436. **Judgments Procured by Attachment.**—Judgments obtained without the personal service of process on the defendant, by means of attaching his property, do not generally create a personal liability, but are limited in their operation to the property attached. They are therefore, at least outside of the states where pronounced, commonly considered as not constituting any cause of action against the defendant.<sup>6</sup>

§ 437. **Action must be in Name of Legal Owner.**—Every action upon a judgment must be brought in the

<sup>1</sup> *Miller v. Dungan*, 35 N. J. L. 391.

<sup>2</sup> *Hooper v. Lucas*, 86 Ind. 43; *McCutchen v. Askew*, 34 La. Ann. 340.

<sup>3</sup> *Kittredge v. Martin*, 141 Mass. 410; *McCormick v. Fiske*, 138 Mass. 195; *Hurlbut v. Thomas*, 55 Conn. 181; 3 Am. St. Rep. 43.

<sup>4</sup> *Wilson v. Hawthorne*, 14 Col. 530; 20 Am. St. Rep. 290.

<sup>5</sup> *Philipson v. Earl of Egremont*, 6 Ad. & E., N. S., 587; *Fowler v. Rick-erby*, 2 Man. & G. 760; 9 Dowl. Pr. 682; 3 Scott N. R. 138.

<sup>6</sup> *Easterly v. Goodwin*, 35 Conn. 279; 95 Am. Dec. 257; *Kane v. Cook*, 8 Cal. 449; *Durand's Succession*, 24 La. Ann. 352; *Banta v. Wood*, 32 Iowa, 473; *Eastman v. Wadleigh*, 65 Me. 251; 20 Am. Rep. 695.

name of its legal owner. If a judgment is entered in favor of A for the use of B, the latter cannot maintain a suit thereon in his own name. He must use the name of A, in whom the legal title is vested.<sup>1</sup>

§ 438. **At Common Law a Judgment does not Survive** the defendant against whom it is rendered. By no mode known to that law can a judgment be enforced against the administrator of a deceased debtor. As to him its character as a judgment is *functus officio*.<sup>2</sup>

§ 439. **Actions against Joint Defendants.**—The plaintiff in an action on a judgment must, except where a code or statute has modified the common-law rule, recover against all of the defendants or none. Whatever constitutes a good defense for one of the defendants operates for the benefit of the others, because the obligation is joint.<sup>3</sup> That a judgment is enjoined is a complete defense to any action upon it.<sup>4</sup> The commitment of defendant to prison under execution does not discharge an action pending on the judgment.<sup>5</sup>

§ 440. **Action does not Affect Right to Execution.**—The plaintiff is entitled to execution on his judgment, notwithstanding the pendency of an action upon it.<sup>6</sup>

§ 441. **Interest.**—It has sometimes been said that at the common law judgments did not draw interest, and in an action on a judgment rendered in another state, interest was in one case denied, because the court presumed that the common law prevailed in such state and that it gave no right to interest.<sup>7</sup> The court, however, was not correctly advised as to the common law. By that law interest could not be collected by execution, and the defendant could satisfy the original judgment at any time

<sup>1</sup> Triplett v. Scott, 12 Ill. 137.

<sup>2</sup> United States v. Cushman, 2 Sum. 810.

<sup>3</sup> Pratt v. Dow, 56 Me. 81.

<sup>4</sup> Blair v. Caldwell, 3 Mo. 353.

<sup>5</sup> Moor v. Towle, 38 Me. 133.

<sup>6</sup> Cushing v. Arnold, 9 Met. 23;

Moor v. Towle, 38 Me. 133; McDonald v. Dickson, 85 N. C. 248.

<sup>7</sup> Thompson v. Monrow, 2 Cal. 99; 56 Am. Dec. 318.

by paying the amount thereof, without interest. If an action was brought upon the judgment, this rule did not apply. The plaintiff was entitled to recover an additional sum, which some of the cases style interest and others damages; but which, by whatever name called, appears to have been equivalent in amount to the interest allowable in actions of debt.<sup>1</sup> Courts of equity were also in the habit of allowing interest upon judgments as damages, independently of any statute requiring them so to do;<sup>2</sup> but in awarding or withholding such interest they were generally controlled by the rules governing courts of law.<sup>3</sup>

In the United States, interest upon judgments and decrees is generally allowed by statute. Where there is any ambiguity in the statute upon the subject, the question may arise whether or not a judgment bears the same rate of interest as the obligation out of which it arose. Thus in a state whose statute declared that all judgments should bear lawful interest, and that lawful interest, where none other was provided by contract, should be seven per centum per annum, it was held that when a judgment was founded upon a contract, it should bear the rate of interest specified in such contract, unless that rate was unlawful.<sup>4</sup> The better opinion is, that upon the entry of judgment the contract recovered upon merges therein, and cannot be considered in determining the interest due the plaintiff.<sup>5</sup> A change in the statute fixing the rate of interest which judgments shall bear does not operate retrospectively, and cannot affect pre-existing judgments.<sup>6</sup>

<sup>1</sup> Sayre v. Austin, 3 Wend. 496; 150; McAlexander v. Lee, 3 A. K. Watson v. Fuller, 6 Johns. 283; Hodgdon v. Hodgdon, 2 N. H. 169; Collais v. McLeod, 8 Ired. 221; 49 Am. Dec. 376; Trenholm v. Bumpfield, 3 Rich. 376; Harrington v. Glenn, 1 Hill (S. C.) 79.

<sup>2</sup> Beall v. Silver, 2 Rand. 401; Tazewell's Ex'rs v. Saunders's Ex'rs, 13 Gratt. 354.

<sup>3</sup> McMillan v. Scott, 1 T. B. Mon.

Marsh. 483.

<sup>4</sup> Cauthen v. Central Ga. Bank, 72 Ga. 367; 53 Am. Rep. 845.

<sup>5</sup> Mason v. Eakle, Breese, 52; Aldrich v. Sharp, 3 Scam. 261; Wernwag v. Brown, 3 Blackf. 457; 26 Am. Dec. 433; Wilson v. Marsh, 13 N. J. Eq. 289.

<sup>6</sup> Cox v. Marlatt, 36 N. J. L. 389; 13 Am. Rep. 454.



## CHAPTER XVIII.

## PROCEEDINGS BY SCIRE FACIAS.

- § 442. Nature and object of.
- § 443. Parties.
- § 444. Pleading—Form of the writ.
- § 445. Service of the writ.
- § 446. Defenses.
- § 447. Judgment.
- § 448. Effect of judgment.
- § 449. Substitute for *scire facias*.

§ 442. **Nature and Object of.**—“A *scire facias* is a writ founded on some matter of record, as a recognizance or judgment, etc., on which it lies to obtain execution, or for other purposes, as to repeal letters patent, hear errors, etc. In general, it is a judicial writ issuing out of a court where the record is, yet, because the defendant may plead thereto, it is considered in law an action; therefore a release of all actions is a good bar to *scire facias*.”<sup>1</sup> “A *scire facias* is a judicial writ issued for the purpose of substantiating and carrying into effect an antecedent judgment.”<sup>2</sup> Before a judgment is either satisfied by payment or barred by lapse of time, it may become temporarily inoperative, so far as the right to issue execution is concerned, and so continue until something is done by which such right is revived. In this condition it is usually called a dormant judgment. This dormancy in judgments was, at common law, usually created either by a change in the parties plaintiff or defendant, or by the lapse of time without issuing of execution. There were also cases in which execution was to be issued in certain contingencies only, and in which it became necessary to establish the existence of the contingency before the writ could be regularly sued out. So the judgment might have been satisfied through fraud or mistake, or by an extent upon property

<sup>1</sup> Tidd's Practice, 1090.

<sup>2</sup> *Jarvis v. Rathburn*, Kirby, 220;  
*Denegre v. Haun*, 13 Iowa, 240.

not belonging to the defendant, and it might therefore be necessary to set aside the apparent satisfaction, and to obtain leave to issue further execution. When from any cause it became necessary to apply to a court for a revivor of the right to issue execution, the remedy of the plaintiff was by *scire facias*. A *scire facias*, as the term is used in this chapter, is a writ issued out of the court wherein a judgment has been entered, or to which the record has been removed, reciting such judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reason, if any there be, why such execution should not issue.<sup>1</sup> "A *scire facias* to revive a judgment is not an original, but a judicial, writ, founded on some matter of record, to enforce execution of it; and, properly speaking, is only the continuation of an action,—a step leading to the execution of a judgment already obtained, and enforcing the original demand for which the action was brought. It creates nothing anew, but may be said to reanimate that which before had existence, but whose vital powers and faculties are, as it were, suspended, and without its salutary influence would be lost."<sup>2</sup>

*Scire facias* is sometimes spoken of as a new action.<sup>3</sup> But the object sought and the result accomplished by a *scire facias* to revive a judgment both show that it is not a new action, but merely a continuation of an old one;<sup>4</sup>

<sup>1</sup> Walker v. Wells, 17 Ga. 547; 63 Am. Dec. 252; Grimke v. Mayrant, 2 Brev. 202; Osgood v. Thurston, 23 Pick. 110; Tindall v. Carson, 1 Har. & J. 94; Barron v. Pagles, 6 Ald. Cond. Rep. 422; Carlton v. Young, 1 Aiken, 332; Wilson v. Tierman, 3 Mo. 757; Vallance v. Sawyer, 4 Greenl. 62; 2 Sellen's Practice, 198; Foster on Scire Facias, 19; Bingham on Judgments and Executions, 123; Challenor v. Niles, 78 Ill. 78; Dougherty's Estate, 9 Watts & S. 189; 42 Am. Dec. 326.

<sup>2</sup> Brown v. Harley, 2 Fla. 164.

<sup>3</sup> Fenner v. Evans, 1 Term Rep. 267; Winter v. Kretscham, 2 Term Rep. 46;

Farrell v. Gleason, 11 Clark & F. 702; Bilbo v. Allen, 4 Heisk. 31; Suancy v. Scott, 9 Humph. 340; State Bank v. Vance, 9 Yerg. 471; Howard v. Randall, 58 Vt. 564.

<sup>4</sup> Fitzhugh v. Blake, 2 Cramoh C. C. 37; Hopkins v. Howard, 12 Tex. 7; Challenor v. Niles, 78 Ill. 78; Carter v. Carriger's Adm'r, 3 Yerg. 411; 24 Am. Dec. 586; Adams v. Rowe, 11 Me. 89; 25 Am. Dec. 266; Denegre v. Haun, 13 Iowa, 240; Freeman on Executions, sec. 81; Funderburk v. Smith, 74 Ga. 515; Masterson v. Cundiff, 58 Tex. 472; Irwin v. Nixon's Heirs, 11 Pa. St. 419; 51 Am. Dec. 559.

no cause of action beyond the old judgment can be asserted; no ground of defense anterior to the old judgment can be brought forward; no relief beyond that embraced in the old judgment can be obtained; and finally, the judgment entered upon the *scire facias* is simply "that the plaintiff have execution for the judgment mentioned in the said *scire facias*, and costs";<sup>1</sup> and whatever destroys the effect of the original judgment also destroys the effect of its revival by *scire facias*. Hence if the original judgment has been reversed or satisfied, there can be no execution issued pursuant to the revival by *scire facias*.<sup>2</sup> In Pennsylvania, the practice in *scire facias* and the judgment therein are different from what they are under the common-law forms of procedure, and accomplish results very similar to those brought about by an action upon a judgment.<sup>3</sup>

The objects of a *scire facias* are,—1. To revive an ordinary judgment between the parties thereto; 2. To obtain execution where a new party is to be charged or benefited; and 3. To obtain execution on a contingent judgment upon the happening of the contingency.<sup>4</sup> As between the original parties, a *scire facias* became necessary,—1. Where by the fault of the plaintiff no execution had issued within a year and a day after the entry of the judgment; and 2. Where at any time the judgment seemed to be satisfied, when in fact it remained wholly or partly unpaid.<sup>5</sup> The cases in which it became necessary to prosecute a *scire facias* to obtain the benefit of an execution for or against a new party arose when a change of parties occurred, through the death, marriage, or bankruptcy of one of the parties.<sup>6</sup>

<sup>1</sup> Vredenberg v. Snyder, 6 Iowa, 39; 28; Shaefer v. Child, 7 Watts, 84; Haaly v. Adama, 15 Ark. 232; Woolston v. Gale, 9 N. J. L. 32; Camp v. Gainer, 8 Tex. 372; Tindall v. Carson, 1 Har. & J. 94; Murray v. Baker, 5 B. Mon. 172.

<sup>2</sup> Eldred v. Haslett's Adm'r, 38 Pa. St. 16.

<sup>3</sup> Custer v. Detterer, 3 Watts & S.

<sup>4</sup> Freeman on Executions, sec. 27, 28, 83.

<sup>5</sup> Freeman on Executions, sec. 53, 54, 83.

<sup>6</sup> Freeman on Executions, sec. 84, 85.

By the common law, the plaintiff was entitled to a *scire facias* to revive a judgment in real actions and also in actions of ejectment and actions of a mixed nature, but his right to this writ in personal actions in which he had neglected to take out execution within a year and a day, was conferred by the Statute of Westminster, 2, chapter 45.<sup>1</sup> A difference of opinion exists as to whether a decree for the payment of a sum of money may be revived by *scire facias*. The majority of the courts declare that this writ is a purely legal one, and cannot be employed except in legal actions or proceedings.<sup>2</sup>

Though the plaintiff's right to an execution still continues, and a revival by *scire facias* has not yet become necessary, and even while an execution is still in the hands of a sheriff, the plaintiff may sue out *scire facias*, and thereby revive his judgment.<sup>3</sup>

§ 443. **Parties.** — If no change has taken place in the parties plaintiff, a *scire facias* to revive a judgment must be prosecuted in the name of all of them;<sup>4</sup> and though the judgment has been assigned, the writ must be in the name of the original plaintiff, unless some statute permits the assignee to proceed in his own name.<sup>5</sup> If a sole plaintiff dies, the *scire facias* must be prosecuted by the person who represents him, who, if the action is personal, is his executor or administrator, and if the action is real, or for the possession of realty, is his heir; while if the judgment was pronounced in a mixed action, it may be necessary for the heir and the personal representative to join.<sup>6</sup> If a judgment was recovered by an unmarried woman, and

<sup>1</sup> Freeman on Executions, sec. 82.

<sup>2</sup> Curtis v. Haun, 14 Ohio, 185; Harst v. Williamson, 42 Ala. 296; Jeffreys v. Yarborough, 1 Dev. Eq. 506; Kirby v. Anders, 26 Ala. 466. *Contra*, Logan v. Cloyd, 1 A. K. Marsh. 201; Isom v. McGehee, 45 Miss. 712.

<sup>3</sup> Masterson v. Cundiff, 58 Tex. 472; Lambson v. Moffet, 61 Md. 426; Trapnall v. Richardson, 13 Ark. 543; 58

Am. Dec. 338; Stille v. Wood, 1 N. J. L. 118.

<sup>4</sup> Barrackman v. Worthington, 5 Blackf. 213; Coddling v. Moore, 5 Blackf. 601.

<sup>5</sup> Mayor of Macon v. Trustees, 7 Ga. 204; Forbes v. Tiffany, 4 Ind. 204; McKinney v. Mehaffey, 7 Watts & S. 276.

<sup>6</sup> Freeman on Executions, sec. 86.

she marries before taking out execution, her husband must join with her in suing out *scire facias*.<sup>1</sup>

If one of several co-plaintiffs dies, and the survivors are entitled to the whole benefit of the judgment, as in personal actions, they may sue out a *scire facias* without joining with them the personal representatives of the decedent, or may, where the judgment has not become dormant, take out execution without first prosecuting a *scire facias*. If, on the other hand, a judgment was rendered in a real action or in an action for the possession of real property, a new party must become interested by the death of one of the several plaintiffs, and a *scire facias* is necessary to justify the issuing of an execution, and he who has thus become a party in interest must be named as one of the parties by whom the *scire facias* is prosecuted.<sup>2</sup> If there has been no change in the parties defendant, the *scire facias* must be against all of them.<sup>3</sup> If some of them have died, the writ must be against those surviving and the representatives of the decedent. In no event can any living defendant who remains answerable for the judgment, nor the representative of any deceased defendant, be omitted from the *scire facias*, unless the non-joinder is waived. "The plaintiff can neither proceed against the survivors without joining the representatives of the decedent, nor against the representatives of the decedent without joining the survivors."<sup>4</sup> If the defendant, being an unmarried woman when the judgment was revived against her, subsequently marries, the *scire facias* must be sued out against her and her husband, and if she dies, a new *scire facias* must issue against the husband only. If the defendant has become a bankrupt, a *scire facias* is necessary to authorize execution against his property in the hands of his assignee.<sup>5</sup>

<sup>1</sup> Johnson v. Parmlee, 17 Johns. 271; Woodyer v. Freshman, 1 Salk. 116; 2 Sellon's Practice, 194.

<sup>2</sup> Freeman on Executions, sec. 85.

<sup>3</sup> Sainsbury v. Pringle, 10 Barn. & C. 751; Bolinger v. Fowler, 14 Ark. 27;

Calloway v. Eubank, 4 J. J. Marsh. 280; Henderson v. Vanhook, 24 Tex. 358; Funderburk v. Smith, 74 Ga. 515.

<sup>4</sup> Freeman on Executions, sec. 87.

<sup>5</sup> Freeman on Executions, sec. 84.

When a judgment sought to be revived by *scire facias* is for the possession of real estate or is a lien thereon, it may be that other persons than the original defendants will be affected by the revival, and then the question arises whether such persons must be parties to the writ. If all the defendants are still living, some of the courts hold that no notice need be taken of persons claiming under them,<sup>1</sup> while other courts insist that revival by *scire facias* is entirely inoperative against persons claiming under the defendant, and not made parties to the writ.<sup>2</sup> If, however, the defendant has died, there appears to be no doubt that it is necessary to prosecute the *scire facias* against all persons who may be affected by the revival of the judgment. If it is not a lien upon real estate, nor for the possession thereof, the personal representative of the decedent is the only necessary party. In other cases all persons who have acquired interests under the defendant, whether by descent, conveyance, or otherwise, must be made parties. These persons are usually called terre-tenants. "Who are terre-tenants, within the meaning of the law, whom it is necessary to make parties to *scire facias*? All who are in possession, deriving title under the judgment debtor, such as heirs, devisees, alienees, after the judgment. They are in, as of the estate of the judgment debtor, and before judgment can be revived and enforced by execution against the land, so as to divest their title, it is necessary to warn them by the *scire facias*, so that they may have an opportunity of making their defense, and of claiming contribution from others holding land of the judgment debtor bound by the judgment. Where a party is in possession, holding title adverse to that of the defendant, or paramount to his, such party is not a terre-tenant, within the meaning of the law, because his rights are in

<sup>1</sup> *Young v. Taylor*, 2 Binn. 228; *Jack-son v. Shaffer*, 11 Johns. 513; *Righter v. Rittenhouse*, 3 Rawle, 378; *Morton v. Crogan*, 20 Johns. 106; *Lunsford v. Turner*, 5 J. J. Marsh. 104; 20 Am. Dec. 248.

<sup>2</sup> *Doub v. Barnes*, 4 Gill, 11; *Bowie v. Neal*, 41 Md. 124; *Chahoon v. Hollenbeck*, 16 Serg. & R. 425; 16 Am. Dec. 587; *Zerus v. Watson*, 11 Pa. St. 260.

no manner affected by the judgment. If he has a good title, the judgment does not bind his land, nor can a sale under the execution affect his interest. One who purchased the lands at a tax sale, and went into possession, is not a terre-tenant. If the sale was valid, the purchaser held a title paramount to the judgment, and not to be affected by the proceedings under the execution. If the sale was invalid, then the purchaser was in possession without title under the judgment debtor, and not as his terre-tenant."<sup>1</sup>

In some of the states, the joinder of heirs and personal representatives is not permitted;<sup>2</sup> but the better opinion is, that heirs, personal representatives, and terre-tenants of the decedent may be joined in the same writ, if all are to be affected by the revival of the judgment.<sup>3</sup>

§ 444. **Pleading — Form of Writ.** — No complaint or petition is necessary to entitle plaintiff to a writ of *scire facias*, but the writ when obtained answers the double purpose of a writ and a declaration.<sup>4</sup> If the object of the writ is to obtain execution of a judgment which has become dormant by the lapse of time, it is not necessary that it should state the fact that execution had not issued within a year and a day.<sup>5</sup> In other respects, it is essential that the writ state all the facts necessary to authorize the relief sought,<sup>6</sup> and failing to do this, it may be demurred to,<sup>7</sup> or, in some of the states, quashed on motion,<sup>8</sup> and though no demurrer nor motion to quash is interposed, the judgment on the *scire facias* may be reversed on ap-

<sup>1</sup> Polk v. Pendleton, 31 Md. 118; McCrary v. Clark, 82 Pa. St. 457; Buck's Appeal, 100 Pa. St. 109; Luak v. Davidson, 3 Penr. & W. 229.

<sup>2</sup> Barnes v. McLemore, 12 Smedes & M. 316; Lee v. McCloskey, 44 How. Pr. 60.

<sup>3</sup> Calloway v. Eubank, 4 J. J. Marsh. 286; Reynolds v. Henderson, 2 Gilm. 110; Rowland v. Harbaugh, 5 Watts, 365; Graves v. Skeels, 6 Ind. 107.

<sup>4</sup> Bish v. Williar, 59 Md. 382; Calhoun v. Adams, 43 Ark. 238; McVeigh

v. Bank of Old Dominion, 76 Va. 276; Merchants' Mut. Ins. Co. v. Hill, 17 Mo. App. 590.

<sup>5</sup> Albin v. State, 46 Ill. 372.

<sup>6</sup> Huey v. Redden, 3 Dana, 488; McVickar v. Ludlow, 2 Ohio, 246; Hicks v. State, 3 Ark. 313; Union Bank v. Powell's Heirs, 3 Fla. 175; 52 Am. Dec. 367.

<sup>7</sup> Prather v. Manro, 11 Gill, 261; Graham v. Smith, 1 Blackf. 413; McKinney v. Mehaffey, 7 Watts & S. 276.

<sup>8</sup> Evans v. Freeland, 3 Munf. 119.

peal if the facts stated in the writ wholly fail to sustain the judgment of revival.<sup>1</sup> The heirs and terre-tenants need not be named in the writ,<sup>2</sup> though there are some authorities declaring that it is preferable that they be named.<sup>3</sup> Generally, instead of attempting to name the heirs and terre-tenants, the writ commands the sheriff to warn the heirs of the defendant, and also the tenants of all the lands of which he was seised.<sup>4</sup> Whenever a new party is to be charged by the writ, it must state the facts which render it necessary to proceed against him.<sup>5</sup> The writ should follow the judgment as to the amount, date, and parties.<sup>6</sup> In other words, it should leave no doubt as to what judgment it is sought to obtain execution upon, and if it does not give the term nor the number of the judgment, nor state the date correctly, and misspells defendant's surname, it has been held that the judgment based thereon is ineffective.<sup>7</sup> If the recitals in the *scire facias* point to the judgment sought to be revived with such certainty that the defendants are informed what judgment is intended, it is sufficient. If there is an exact coincidence of names of parties, of the court, of the debt and amount of the judgment, and of its having been entered on an award, there can be no doubt of the identity of the judgment recited and that offered in evidence, though the judgment in respect to the costs was not recited in the *scire facias*.<sup>8</sup>

Defects or variances in a writ resulting from clerical errors or omissions may be amended by permission of the court at any time prior to the entry of the judgment

<sup>1</sup> Waller v. Huff, 9 Tex. 530; Wray v. Williams, 2 Yerg. 301.

<sup>2</sup> Seawell v. Williams, Hayw. (N. C.) 290; Williams v. Fowler, 3 T. B. Mon. 316; Hughes v. Wilkinson, 28 Miss. 600.

<sup>3</sup> Chahoon v. Hollenback, 16 Serg. & R. 425; 16 Am. Dec. 587.

<sup>4</sup> Freeman on Executions, sec. 88.

<sup>5</sup> Freeman on Executions, sec. 88; Graham v. Smith, 1 Blackf. 414; Wray

v. Williams, 2 Yerg. 301; Gibson v. Davis, 22 Vt. 374.

<sup>6</sup> Richter v. Cummings, 90 Pa. St. 441; Wolf v. Poundsford, 4 Ohio, 397; Warfield v. Brewer, 4 Gill, 266; Dietrich's Appeal, 107 Pa. St. 174.

<sup>7</sup> Worman's Appeal, 110 Pa. St. 25.

<sup>8</sup> Ward v. Prather's Adm'r, 1 J. J. Marsh. 4; Dougherty's Estate, 9 Watts & S. 189; 42 Am. Dec. 326; Richardson v. Prince George, 11 Gratt. 190; Orput v. Hardy, 6 Blackf. 456.



thereon,<sup>1</sup> or the court may, instead of directing an amendment, permit the plaintiff to take out a new writ, returnable at some other day or term.<sup>2</sup> In some of the states, if *nul tiel* record is pleaded, the judgment offered in evidence must correspond with that described in the writ in all substantial particulars. Hence, under this plea, it has been held that no judgment of revival could be entered if the original judgment was misdescribed in the writ with respect to its amount, or the name of the court in which it was entered.<sup>3</sup>

§ 445. *Service of the Writ.*—So far as the defendants and the heirs and terre-tenants named in the writ are concerned, there is no doubt that a judgment may be revived without giving them any actual notice. The sheriff may, without making any attempt to serve them, return "*nihil*"; that is, that they have nothing by which he can warn them. Thereupon the plaintiff may sue out an *alias* writ, upon which the sheriff may make a like return. When two returns of *nihil* have been made, the plaintiff is entitled to judgment against the defendants and the heirs and terre-tenants named in the writ as though they had been personally served, but they may escape the effect of such judgment by showing by *audita querela* or by motion that the revival was improper.<sup>4</sup>

The plaintiff may, on the other hand, have the writ served personally on the defendant, in which event the sheriff returns "*scire feci*"; that is, that he has warned him. Where actual service of the writ is made, it must be by the sheriff to whom it is directed,<sup>5</sup> and must be upon each of the defendants personally.<sup>6</sup> If the heirs and terre-tenants are not named in the writ, the sheriff must

<sup>1</sup> *Garey v. Sangston*, 64 Md. 31; *Taylor v. Wharfield*, 2 Cranch C. C. 248; *Johnson v. Goddard*, 19 Ga. 597; *Haseldine v. Walker*, 1 Har. & J. 487; *Smith v. Brisbane*, 2 Bay. 557; *Willard v. Norris*, 2 Rawle, 56.

<sup>2</sup> *Tandy v. Rowell*, 54 N. H. 384.

<sup>3</sup> *Porter v. Brisbane*, 1 Brev. 456;

*Coleman v. Edwards*, 4 Bibb, 347.

<sup>4</sup> *Freeman on Executions*, sec. 89.

<sup>5</sup> *Kennedy v. People*, 15 Ill. 418.

<sup>6</sup> *McCombs v. Foeter*, 1 Wend. 19; *Breckenridge v. Miller*, 1 How. (Miss.) 273.

either return that there are none, or that he has served certain persons, naming them, as tenants of certain lands, and that there are no others. If, however, the heirs and terre-tenants are named in the writ, two returns of *nihil* as to them have the same effect as like returns against the original defendants.<sup>1</sup> In many of the states the mode of serving this writ has been modified by statute,<sup>2</sup> and in some of them the writ is operative for the purpose of continuing a judgment lien, if it is sued out in due time, though it is not served at all.<sup>3</sup> Whatever be the mode of service authorized by the laws of the state, it must be substantially pursued by the officer charged with the service of the writ. Otherwise the judgment of revivor is inoperative.<sup>4</sup>

§ 446. **Defenses.**—If any one appears in response to the writ, the plaintiff may declare against him. This declaration need not contain anything except a recital setting forth a copy of the writ and a prayer for execution thereon. The defendant may then plead either in bar or in abatement. The extent and character of the defenses which may be received are obviously the same as in actions at law upon judgments. In other words, it may be shown that the judgment is void,<sup>5</sup> but not that it is erroneous or irregular;<sup>6</sup> nor can any defense be urged which existed before the judgment was entered, and might have been asserted in the original action.<sup>7</sup> It must be shown

<sup>1</sup> Freeman on Executions, sec. 89; Cumming v. Eden, 1 Cow. 70.

<sup>2</sup> Note to Frierson v. Harris, 94 Am. Dec. 238.

<sup>3</sup> Lichty v. Hochstetler, 91 Pa. St. 444; Porter v. Hitchcock, 98 Pa. St. 625.

<sup>4</sup> Simmons v. Wood, 6 Yerg. 518; People v. The Judges, 1 Wend. 19.

<sup>5</sup> Ulrich v. Voneida, 1 Penr. & W. 245; Griswold v. Steward, 4 Cow. 457; Clinton Bank v. Hart, 19 Ohio St. 372; Phelps v. Hawkins, 6 Mo. 197.

<sup>6</sup> Anthony v. Humphries, 9 Ark. 176; Barber v. Chandler, 17 Pa. St. 48; 55 Am. Dec. 503; Langston v. Abbey, 43

Miss. 164; Betancourt v. Eberlin, 71 Ala. 461; McAfee v. Patterson, 2 Smedes & M. 595; Folger v. Slaughter, 33 La. Ann. 341; Calhoun v. Adams, 43 Ark. 238.

<sup>7</sup> Freeman on Executions, sec. 90; McVeigh v. Little, 7 Pa. St. 279; Smith v. Eaton, 36 Mass. 298; 58 Am. Dec. 746; Lysle v. Williams, 15 Serg. & R. 135; Betancourt v. Eberlin, 71 Ala. 461; Campbell's Appeal, 118 Pa. St. 128; Conlyn v. Parker, 113 Pa. St. 39; Camp v. Baker, 40 Ga. 148; Koon v. Ivy, 8 Rich. 37; Bowen v. Bonner, 45 Miss. 10.

either that there is no judgment in contemplation of law, or that for some reason it has ceased to be operative.<sup>1</sup> Though the judgment was valid when rendered, its revival may be successfully resisted by proving any matter occurring after such rendition, and making it improper to further enforce it, such as payment, release,<sup>2</sup> accord and satisfaction,<sup>3</sup> or discharge in bankruptcy.<sup>4</sup> The rule that nothing admissible as a defense in the original action is admissible against proceedings on *scire facias* is confined to the parties and their privies, and does not operate to the prejudice of strangers.<sup>5</sup> In Massachusetts, a judgment charging an alleged trustee on his default in the original action has never been regarded as conclusive against him. He might always, on *scire facias*, introduce proof to show that he was not in fact chargeable.<sup>6</sup>

§ 447. Judgment on. — The judgment which may be rendered for the plaintiff on *scire facias* is not a new judgment for the amount of the original debt, damages, and costs. The entry should be "that plaintiff have execution for the judgment mentioned in the said *scire facias* and his costs." If a judgment is entered up in the nature of an original judgment, or to the effect that plaintiff recover a certain sum of money or a designated parcel of real or personal property, it is void.<sup>7</sup> The practice in Pennsylvania is different. There *scire facias* is not a mere judgment that execution issue, but a new judgment for a greater sum than the old one. The new judgment

<sup>1</sup> Blackburn v. Beall, 21 Md. 208; St. 67; Duncan v. Hargrove, 22 Ala. Dowling v. McGregor, 91 Pa. St. 410; 150.

McCracken v. Swartz, 5 Or. 62; May <sup>2</sup> Griswold v. Stewart, 4 Cow. 459.

v. State Bank, 2 Rob. (Va.) 56; 40 <sup>3</sup> Brown v. Neale, 3 Allen, 74; 80 Am. Dec. 726. <sup>4</sup> Am. Dec. 53.

<sup>5</sup> Freeman on Executions, sec. 90; <sup>7</sup> Vredenburgh v. Snyder, 6 Iowa, Bown v. Morange, 108 Pa. St. 69; 39; Woolston v. Gale, 9 N. J. L. 32; Seymour v. Hubert, 83 Pa. St. 346; Camp v. Gainer, 8 Tex. 372; Murray v. Baker, 5 B. Mon. 172; Hanly v. Adams, 15 Ark. 232; Walton v. Vanderhoof, 2 N. J. L. 73.

Am. Dec. 240. <sup>6</sup> Lavell v. McCurdy, 77 Va. 763; Camp v. Gainer, 8 Tex. 372; Bullock v. Ballew, 9 Tex. 498; Irwin v. Nixon's

<sup>7</sup> McCullough v. Franklin Coal Co., 21 Md. 256. Heirs, 11 Pa. St. 419; 51 Am. Dec. 559.

<sup>8</sup> Spring Run Coal Co. v. Tosier, 102 Pa. St. 342; Stewart v. Colwell, 24 Pa.

is a lien on lands not bound by the old one. It seems also to merge the original judgment, so that if a second *scire facias* is desired, it can only be obtained on the first *scire facias*, and not on the original judgment.<sup>1</sup>

§ 448. **Effect of Judgment.**—The effect of a judgment entered upon a *scire facias* as an adjudication does not differ from that of other judgments. It cannot be collaterally avoided for mere error or irregularity,<sup>2</sup> and until set aside by some proper proceeding, it conclusively establishes the facts necessary to support it as against all persons properly made parties thereto, so that they cannot afterward insist that there was no such judgment, nor that it had been paid prior to its revival, or released or discharged by proceedings in bankruptcy or otherwise.<sup>3</sup> Third persons affected by a judgment of revivor, when it is entered, may impeach it by showing that it was suffered through the collusion of the plaintiff and the defendant, when the former was not entitled to have his judgment revived.<sup>4</sup>

If there is any person entitled to be served with the writ or to be made a party thereto, and he is not made a party, or being made a party is not served with the writ when the law requires him to be so served, the judgment of revival cannot affect him.<sup>5</sup> In Pennsylvania, proceedings on *scire facias* have been held to be inoperative against a party who was neither a terre-tenant nor a claimant under a title which was ever subject to the lien. Thus a purchaser of land prior to any judgment against the owner, being subsequently summoned as terre-tenant, made default, and judgment thereon was entered against him.

<sup>1</sup> *Custer v. Detterer*, 3 Watts & S. 23. See, however, *Irwin v. Nixon's Heirs*, 11 Pa. St. 419; 51 Am. Dec. 559.

<sup>2</sup> *Jackson v. Robins*, 16 Johns. 537; *Jackson v. Delaney*, 13 Johns. 537; 7 Am. Dec. 403; *Jackson v. Bartlett*, 8 Johns. 366.

<sup>3</sup> *Irwin v. Nixon's Heirs*, 11 Pa. St.

419; 51 Am. Dec. 559; *Garrison v. People*, 21 Ill. 535; *Stevens v. North Pennsylvania etc.*, 35 Pa. St. 265; *Thomas v. Towns*, 66 Ga. 78; *Dengler v. Kiehner*, 13 Pa. St. 38; 53 Am. Dec. 441.

<sup>4</sup> *Ayre's Adm'r v. Burke*, 82 Va. 338.

<sup>5</sup> *Brown v. Simpson*, 2 Watts, 233.

This was held not to estop him from setting up his title against that of the purchaser at a sale under the judgment on the *scire facias*, and showing that instead of being a terre-tenant, he held by title paramount to the judgment. The reasoning on which this decision was founded was, that the statute only authorized the summoning of the terre-tenant, and that the summoning of another person, being unauthorized, was void.<sup>1</sup>

§ 449. **Substitute for Scire Facias.**—Proceedings by *scire facias* to revive judgments are gradually becoming obsolete. In a majority of the states, when judgments are not yet barred by the statute of limitations, but the plaintiff's right to execution has so far terminated that he must make an application to the court for an order or judgment entitling him to the writ, such application is usually made upon motion, a notice of which must be served upon the defendant or other person whose interests are to be affected by the revival.<sup>2</sup> We shall not here attempt any compilation of the different statutory regulations upon this subject, but shall leave our reader to consult such of the local statutes as may be applicable to the question or proceeding in which he may be interested.<sup>3</sup>

<sup>1</sup> *Adams v. State*, 67 Md. 447; *Drum v. Kelly*, 34 Pa. St. 415; affirming *Kiehner v. Watts*, 13 Pa. St. 38; *Mitchell v. Hamilton*, 8 Pa. St. 486; *Helfrich's Appeal*, 15 Pa. St. 382; and overruling *Himes v. Jacobs*, 1 Pa. Rep. 152; *Kiehner v. Dengler*, 1 Watts, 424; *Minier v. Saltmarsh*, 5 Watts, 293.

<sup>2</sup> *Freeman on Executions*, secs. 95-97.

<sup>3</sup> *Scire facias* may, in our opinion, be more properly treated under the subject of executions than under that of judgments. Hence we refer the reader to chapter VIII. of *Freeman on Executions*, and to the monographic note to *Frierson v. Harris's Heirs*, 94 Am. Dec. 222-246.

## CHAPTER XIX.

## OF PLEADING JUDGMENTS.

## PART I.

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§ 451. Plea must correspond in dignity with the judgment.

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## PART III.—DESCRIBING JUDGMENTS.

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## PART V.

§ 461. Pleas of judgments in other states.

§ 450. **Pleading—General Form.**—As every judgment is conclusive on the parties while it remains in force, it is not necessary, in asserting it as a cause of action or of defense, to aver any of the anterior proceedings or considerations on which it is based. The approved precedents of declarations upon judgments state the date or term at which the judgment was recovered, the court in which and the place where it was rendered, and the amount which, by the consideration of the court, the plaintiff has recovered.<sup>1</sup> The judgment need not be set out *in hæc verba*. A statement of its legal effect is sufficient.<sup>2</sup> The fact that no appeal has been prosecuted from the judgment need not be averred.<sup>3</sup> Though the com-

<sup>1</sup> *Andrews v. Flack*, 88 Ala. 294;  
*Ewing v. Jennings*, 15 Nev. 379; *Mount*  
*v. Scholes*, 120 Ill. 394.

<sup>2</sup> *Central Bank v. Veasy*, 14 Ark. 671.

<sup>3</sup> *Chaquette v. Ortel*, 60 Cal. 594.

plaint is by an assignee, no demand for payment need be averred.<sup>1</sup> Neither is it essential to state that the judgment is still in full force or virtue, or that it remains unsatisfied, or that it is still the property of the plaintiff. It is sufficient to allege that the sum named is still due,<sup>2</sup> or to use some averment from which, according to the interpretation of pleadings sanctioned by the decisions in the state, the inference must follow that the judgment is still unpaid. A judgment in favor of an administrator is assets in his hands. He need not, in suing upon it, describe himself as administrator, nor aver the issuing of letters of administration. His right to sue and his official capacity have passed *in rem judicatum*.<sup>3</sup> So in an action against a stockholder based upon a judgment against a corporation, it is unnecessary to aver the nature of the indebtedness out of which the judgment arose.<sup>4</sup> If facts not disclosed by the judgment roll are necessary to entitle the plaintiff to recover, they should be averred in his complaint. Hence if he seeks to recover as assignee, the fact of the assignment to him must be alleged;<sup>5</sup> or if the person against whom he brings action is designated in the judgment by a fictitious name, or a name different from that in which the present action is brought against him, the complaint must show that the defendant now sued is the same person against whom the judgment was recovered.<sup>6</sup>

§ 451. **Pleas Adapted to Dignity of Judgment.** — The actions which may be brought upon judgments, and the pleas which may be made in such actions, depend upon the character and dignity of the judgment in controversy.<sup>7</sup> If the judgment sued upon is a record, and the common-

<sup>1</sup> Moss v. Shannon, 1 Hilt. 175;  
Masterson v. Matthews, 60 Ala. 260;  
Pennington v. Gibson, 16 How. 65;  
Biddle v. Wilkins, 1 Pet. 686.

<sup>2</sup> Blake v. Burley, 9 Iowa, 592.

<sup>3</sup> Biddle v. Wilkins, 1 Pet. 692;  
Crawford v. Whittall, Doug. 4, note A;  
Talmage v. Chapel, 16 Mass. 71.

<sup>4</sup> Miller v. White, 57 Barb. 504.

<sup>5</sup> Hughes v. Brewer, 7 Col. 583.

<sup>6</sup> Newcomb v. Peck, 17 Vt. 302; 44  
Am. Dec. 340.

<sup>7</sup> Mills v. Duryee, 7 Cranch, 481;  
Indianapolis, B., & W. R'y Co. v. Ris-  
ley, 50 Ind. 60.

law rules respecting forms of action have not been abrogated, the action must be one appropriate to recovery upon a matter of record. In other words, it must be an action of debt.<sup>1</sup> The proceedings of courts of chancery are not records;<sup>2</sup> therefore *nul tiel* record is a bad plea to an action upon a decree.<sup>3</sup> Judgments of justices of the peace are generally considered as matters not of record, and are therefore declared upon in *assumpsit* instead of in debt.<sup>4</sup> But in some of the states they are treated as records, and must be sued upon as such.<sup>5</sup>

#### PART II. — AVERMENTS OF JURISDICTION.

§ 452. **Jurisdiction of Courts of Record.** — From the well-known rule that courts of superior or general jurisdiction are presumed to act by right, and within the authority conferred upon them by law, it follows that their judgments and decrees are, in all cases, of at least *prima facie* validity. In asserting such a judgment or decree as a cause of action, or as a ground of defense, the plaintiff need state no jurisdictional facts. According to the opinion reported in a Kentucky case,<sup>6</sup> "it is sufficient to state briefly that the plaintiff impleaded the defendant, and by the consideration of the court recovered judgment, etc." In Vermont, it has been said that enough of the previous proceedings should be stated to show that the parties were properly in court, and that the subject-matter of the controversy was such as the court had authority to determine; and that, for this purpose, a mere statement that the defendant being summoned or attached "with the common form, *taliter processum est*, is ordinarily sufficient."<sup>7</sup> But in so far as these cases indicate that it is essential to aver anything whatever to show the jurisdic-

<sup>1</sup> *Andrews v. Montgomery*, 19 Johns. 162; 10 Am. Dec. 213; *Morehead v. Gresham*, 13 Ark. 431; *Garland v. Tucker*, 1 Bibb, 361; *Boston L. R. Co. v. Hoit*, 14 Vt. 92.

<sup>2</sup> *Doughty v. Fawn*, Yelv. 226; *Co. Litt.* 260; *Bull. N. P.* 245; 1 *Gilbert on Evidence*, 49.

<sup>3</sup> *Evans v. Tatem*, 9 Serg. & R. 252; 11 Am. Dec. 717.

<sup>4</sup> *Green v. Fry*, 1 Cranch C. C. 137.

<sup>5</sup> *Bain v. Hunt*, 3 Hawks, 572.

<sup>6</sup> *Caldwell v. Richards*, 2 Bibb, 331; *Burnes v. Simpson*, 9 Kan. 663.

<sup>7</sup> *Downer v. Dana*, 22 Vt. 337.



tion of courts of record, they are not sustained by the authorities. It is the settled practice "to allege generally that the plaintiff, by the consideration and judgment of the court, recovered the sum mentioned."<sup>1</sup> "It was long ago settled that in pleading a judgment it is unnecessary to show by averment that the court had jurisdiction."<sup>2</sup> "The presumption of law is conclusive that all the requisite prior proceedings were had in the case, till the contrary appears. Proceedings in the United States district court under the bankrupt act form no exception."<sup>3</sup>

§ 453. **Courts of the Sister States and of Foreign Countries.**—The presumptions in favor of jurisdiction are the same whether the judgment relied upon is domestic, foreign, or of one of the sister states of this Union. The allegations in a complaint seeking to recover upon a judgment rendered in another state need not differ from those in a complaint on a domestic judgment. Neither the authority of the court to act, its jurisdiction over the subject-matter, nor the steps taken to acquire jurisdiction over the parties, need be stated.<sup>4</sup> Perhaps the question most worthy of doubt is, whether, when an action is upon a judgment entered in another state, the complaint should show whether the court rendering it was a court of record or not. In some instances complaints have been held to be

<sup>1</sup> Chitty's Pleading, 354; Biddle v. Wilkins, 1 Pet. 686.

<sup>2</sup> Spaulding v. Baldwin, 31 Ind. 376; Rogers v. Odell, 39 N. H. 452; Pennington v. Gibson, 16 How. 65; Butcher v. Bank of Brownsville, 2 Kan. 70; 83 Am. Dec. 446; Holmes v. Campbell, 12 Minn. 221; Judge v. Fillmore, 1 Chip. 423; Springateene v. Gillett, 30 Hun, 260; Campe v. Lassen, 67 Cal. 139; Hansford v. Van Auken, 79 Ind. 302; Wilbur v. Abbot, 58 N. H. 272.

<sup>3</sup> Lathrop v. Stuart, 5 McLean, 167.

<sup>4</sup> Reid v. Boyd, 13 Tex. 241; 65 Am. Dec. 61; Bissell v. Wheelock, 11 Cus. 277; Stephens v. Roby, 27 Miss. 744; Williams v. Preston, 3 J. J. Marsh.

600; 20 Am. Dec. 179; Wheeler v. Raymond, 8 Cow. 311; Bruckman v. Tausig, 7 Col. 561; Horton v. Critchfield, 18 Ill. 133; 65 Am. Dec. 701; Miller v. Leach, 95 N. C. 229; Bank of U. S. v. Merchants' Bank, 7 Gill, 415; Davis v. Lane, 2 Ind. 548; 48 Am. Dec. 458; Mink v. Shaffer, 124 Pa. St. 280; Meredith v. Santa Clara M. Co., 56 Cal. 178; Graydon v. Justus, 24 La. Ann. 222; Dunbar v. Hallowell, 34 Ill. 168. For *contra* view, see Ashley v. Laird, 14 Ind. 222; 77 Am. Dec. 67; Smith v. Mulliken, 2 Minn. 319; Gebhard v. Garnier, 12 Bush, 321; 23 Am. Rep. 721; Karns v. Kunkle, 2 Minn. 313; overruled in Gunn v. Peakes, 36 Minn. 177; 1 Am. St. Rep. 661.

defective for not showing that the court upon whose judgments they were founded were courts of general jurisdiction, or that they had jurisdiction of the subject-matter of the judgment and of the person of the defendant.<sup>1</sup> Generally, however, courts will either take judicial notice of the jurisdiction of the court named in the complaint, though it derives its powers from the constitution and laws of another state,<sup>2</sup> or will presume from its name that it is a court of record of general jurisdiction,<sup>3</sup> unless such name is one commonly employed to denote an inferior court.

The rules herein stated respecting jurisdictional averments in actions upon judgments rendered in other states are equally applicable to complaints in actions upon judgments of our national courts,<sup>4</sup> or of courts of foreign nations.<sup>5</sup>

§ 454. **Courts of Special Jurisdiction.**—"It is sufficient to state the judgment concisely, even though it were recovered in an inferior court not of record."<sup>6</sup> But nothing is presumed in favor of the jurisdiction of inferior courts. Hence such jurisdiction must be shown. If an inferior court upon whose judgment an action is brought was a foreign one, its jurisdiction over the subject-matter must be alleged, because judicial notice will not be taken of the laws conferring jurisdiction upon the inferior courts of other states or countries. If, on the other hand, the court is a domestic tribunal, the courts of the state in which it is authorized to act will take judicial notice of the statute or other law granting it jurisdiction, and it will be necessary for the pleader to state only such facts as are required to justify its assumption of jurisdiction

<sup>1</sup> *Tessier v. Englehart*, 18 Neb. 167.

<sup>2</sup> *Butcher v. Bank of Brownsville*, 2 Kan. 70; 83 Am. Dec. 446; *Shotwell v. Harrison*, 22 Mich. 410.

<sup>3</sup> *Jarvis v. Robinson*, 21 Wis. 523; 94 Am. Dec. 560; *Specklemeyer v. Dailey*, 23 Neb. 101; 6 Am. St. Rep. 119.

<sup>4</sup> *Gunn v. Howell*, 27 Ala. 663; 62 Am. Dec. 785; *Reed v. Vaughan*, 15 Mo. 137; 55 Am. Dec. 133.

<sup>5</sup> *Robertson v. Struth*, 5 Q. B. 941; *Dav. & M.* 773; 8 Jur. 404; 2 Chitty's Pleading, 243, 244; *Gunn v. Peakes*, 36 Minn. 177; 1 Am. St. Rep. 661.

<sup>6</sup> 1 Chitty's Pleading, 370.

over the parties. And the general allegation that the court had jurisdiction is not sufficient. The facts upon which the jurisdiction depends must be stated,<sup>1</sup> though it is no longer essential that the proceedings be set forth at large. The exception to this rule is when plaintiff in an action has been subjected to costs, in which case, having brought the suit, he is liable under the judgment, whether the court had jurisdiction or not.<sup>2</sup> In declaring on a justice's judgment rendered in a suit commenced by summons, alleged to be duly issued and served, it is unnecessary to aver that the summons was returned, or that it specified a particular hour for the appearance of the defendant, or that the court was held at the time and place named in the summons, or that the sum sued for was within the jurisdiction of the court, or that the defendant resided in the county. The service of process in the county makes a case of *prima facie* jurisdiction.<sup>3</sup>

Many of the states have passed statutes in which it is provided that in pleading the judgment or determination of a court of special jurisdiction, the facts conferring jurisdiction need not be stated; but that the "averment that the judgment or determination was duly given or made shall be sufficient."<sup>4</sup> This statute is not complied with by alleging that "a judgment was entered in said action." Though it probably is not essential that the precise words of the statute be employed, they cannot be substituted by words not having the same effect. The word "*duly*" has been held to be indispensable.<sup>5</sup> In Arkansas, an allegation that a judgment was obtained "in due course of procedure" is equivalent to an averment

<sup>1</sup> *Bridge v. Ford*, 4 Mass. 641; *Cleveland v. Rogers*, 6 Wend. 438; *Willey v. Strickland*, 8 Ind. 463; *Turner v. Roby*, 3 N. Y. 193; *Rowland v. Veate*, 1 Cowp. 18; *Makareth v. Pollard*, 1 Ld. Raym. 80.

<sup>2</sup> *Turner v. Roby*, 3 N. Y. 193.

<sup>3</sup> *Barnes v. Harris*, 4 N. Y. 375.

<sup>4</sup> Cal. Code Civ. Proc., sec. 456; *Keys v. Grannia*, 3 Nev. 548; *Crake v. Crake*, 18 Ind. 156; *Richardson v.*

*Hickman*, 22 Ind. 244; N. Y. Code, sec. 532; Ark. Dig. Stats., sec. 5067; Arizona Comp. Laws, sec. 2495; Col. Code Civ. Proc., sec. 66; Kan. Code Civ. Proc., sec. 121; Ky. Code Civ. Proc., sec. 122; Ohio Rev. Stats., sec. 5090; Howell's Mich. Stats., sec. 6878; *Lazarus v. Freidheim*, 51 Ark. 371.

<sup>5</sup> *Hunt v. Dutcher*, 13 How. Pa. 538.

that it was duly given.<sup>1</sup> The answer in a suit upon a promissory note set up the defendant's discharge by virtue of a decree in *insolvency*. A demurrer being interposed on the ground that the answer did not show that the note was included in the defendant's schedule, the court held that the allegation that a judgment had been *duly made and rendered*, discharging defendant from the demand sued upon, was sufficient, and that whether the demand was included or not was a matter to be determined at the trial by inspecting the record.<sup>2</sup> This provision of the statutes has been decided to be inapplicable to foreign judgments.<sup>3</sup> But in Indiana, at least, it is applied to judgments rendered in any of the sister states.<sup>4</sup>

§ 455. *Plea to the Jurisdiction.*—A plea to the jurisdiction of a court of general jurisdiction must set forth the facts showing want of authority in the court which rendered the judgment, and must be certain in every particular. If, by any reasonable intendment, the facts alleged can exist, and the court at the same time have jurisdiction, the plea is bad.<sup>5</sup> This principle has been applied to foreign judgments in several instances by the English courts. Thus a plea that defendant was not served with process issuing out of the said court, nor had he any notice of such *process*, nor did he appear in said suit, was held bad on demurrer, because it did not show that no process *issued*, nor that defendant was not summoned so as to have a full opportunity for defense.<sup>6</sup> The showing of a party that at the time the suit was commenced, and down to the termination of it, he was not only absent from the place, but had no one there to represent him or on whom any process could be served, is sufficient to avoid the *prima facie* evidence of a foreign judgment.<sup>7</sup> But, accord-

<sup>1</sup> *Lamarus v. Freidheim*, 51 Ark. 371.

<sup>2</sup> *Hanscom v. Tower*, 17 Cal. 518.

<sup>3</sup> *Hollister v. Hollister*, 10 How. Pr. 539; *McLaughlin v. Nichols*, 13 Abb. Pr. 244.

<sup>4</sup> *Crake v. Crake*, 18 Ind. 156.

<sup>5</sup> *Diblee v. Davison*, 25 Ill. 486.

<sup>6</sup> *Reynolds v. Fenton*, 3 Com. B. 187.

<sup>7</sup> *Smith v. Nicolls*, 5 Bing. N. C. 208. See also *Ferguson v. Mahon*, 3 Perry & D. 143.

ing to another English case, this showing is not sufficient, because it does not directly state that defendant was not a subject of nor domiciled in the county where judgment was rendered.<sup>1</sup>

It has been said that, in an action on a judgment entered in another state, the defendant may, under the plea of *nil debet*, show that the court had no jurisdiction over his person;<sup>2</sup> and we have not discovered any authorities necessarily in conflict with this assertion. Nevertheless we doubt its correctness, and incline to the opinion that whenever the alleged want of jurisdiction is not disclosed by the record, it must be presented as a defense by a special plea.<sup>3</sup> In no event can it be admitted under the plea of *nul tiel* record. "If it appears on the face of the record that the court did have jurisdiction, extrinsic evidence to contradict is not admissible under a plea of *nul tiel* record. The office of pleading is to inform the court and the parties of the facts in issue; the court, that it may declare the law, and the parties, that they may know what to meet by their proof. *Nul tiel* record puts in issue only the fact of the existence of the record, and is met by the production of the record itself, valid upon its face, or an exemplification duly authenticated under the act of Congress. A defense requiring evidence to contradict the record must necessarily admit that the record exists as a matter of fact, and seek relief by avoiding its effect. It should therefore be formally pleaded, in order that the facts upon which it is predicated may be admitted or put in issue. Under the common-law system of pleading this would be done by a special plea. The equivalent of such a plea is required under any system. The precise form in which the statement should be made will depend

<sup>1</sup> *Cowan v. Braidwood*, 9 Dowl. Pr. 27.

<sup>2</sup> *Thompson v. Whitman*, 18 Wall. 463; *Crane v. Dawson*, 19 Mo. App. 214; *Wright v. Boynton*, 37 N. H. 9; 72 Am. Dec. 319; *Bissell v. Briggs*, 9 Mass. 462; 6 Am. Dec. 88; *Judkins v. Union M. F. I. Co.*, 37 N. H. 482;

*Foster v. Glasener*, 27 Ala. 391; *Stephens v. Gaylord*, 11 Mass. 266.

<sup>3</sup> That *nil debet* is never a proper plea to an action on a judgment of a court of record in another state: *Newcomb v. Peck*, 17 Vt. 302; 44 Am. Dec. 340; *Davis v. Lane*, 2 Ind. 648; 54 Am. Dec. 458; *Andrews v. Flack*, 88 Ala. 294.

upon the practice of the court in which it is to be used, but it must be made in some form. Defects appearing on the face of the record may be taken advantage of upon its production under a plea of *nul tiel* record, but those which require extrinsic evidence to make them apparent must be formally alleged before they can be proven. This we believe to be in accordance with the practice of all courts in which such defenses have been allowed, and it is certainly the logical deduction from the elementary principles of pleading."<sup>1</sup>

#### PART III.—DESCRIPTION OF JUDGMENTS.

§ 456. **Great Particularity Required.**—"In averring matters of record, great particularity should be observed. Any misstatement in the description of a record in pleading is, as a general rule, fatal to such pleading. The averments and proof must be identical."<sup>2</sup> The precise words of the record need not be followed. "Surplusage or immaterial omissions not matters of substance are attended with no other consequences than in other cases. As to matters of *description* it is otherwise, and there the record produced must conform strictly to the plea. It has been considered that if any circumstances descriptive of the record be untruly stated, though they were not necessary to be stated at all, it will be fatal on *nul tiel* record. This is because the issue puts in question the identity of the record set up as evidence of the former recovery. The party to a suit, by pleading a record with a *prout patet*, proffers that issue, and it is incumbent on him to maintain it literally; this as well where the averment has reference to particulars which need not be specifically stated upon the record as to those which must be so."<sup>3</sup> In describing a judgment, the court in which it was rendered,<sup>4</sup>

<sup>1</sup> Hill v. Mendenhall, 21 Wall. 453.

<sup>2</sup> Lawrence v. Willoughby, 1 Minn. 87; 2 Chitty's Pleading, 482, 483, and notes.

<sup>3</sup> Whitaker v. Bramson, 2 Paine, 209. For instances of cases regarding fatal and non-fatal variances, see case

just cited; also Barringer v. Boyd, 27 Miss. 473; Central Bank v. Veasey, 14 Ark. 672; 2 Chitty's Pleading, 483, and notes; Few v. Backhouse, 1 Will. W. & H. 658; Billing v. Hitchings, 18 L. J. Ex., N. S., 192.

<sup>4</sup> Packard v. Hill, 7 Cow. 434.

the place where the court was held,' the names of the parties, the date or term at which it was entered, and the sum recovered must be shown.<sup>2</sup> An action was brought against L. B. and E., his wife, upon a judgment alleged to have been recovered against her, while she was unmarried, by the name of E. R., to which the plea of *nul tiel* record was interposed. The judgment, when offered in evidence, was objected to because against E. R. *and others*, instead of E. R. alone. The court held that if the defendants desired to take advantage of the non-joinder of others, they could do so only by a plea *in abatement*; that in this case there was no variance, because there was a judgment *against E. R.*, and that an action of debt on a judgment is not different in principle from the ordinary case of an action of debt against several joint contractors, in which case objections cannot be taken on the ground of variance, but only, if at all, by way of plea in abatement.<sup>3</sup> A different construction prevails in Georgia.<sup>4</sup> But where the declaration averred a judgment against A and B, and the record put in evidence showed a judgment rendered in another state upon service on A alone, under the "joint debtor act," it was held that the judgment was valid against A only, and that the description of it as being against A and B was therefore a fatal variance.<sup>5</sup>

§ 457. **Variance.**—The misdescription of a judgment in regard to the term at which it was rendered is said not to be fatal, where the record set up is a mere matter of inducement, as in case for a false return.<sup>6</sup> In South Carolina, at an early day, it was decided that want of a writ and of a copy of the cause of action, blanks in the declaration, and a clerical error as to date of rendition, are none of them fatal objections to a judgment on plea of *nul tiel* record, because sufficient appears to show that a judgment was entered as alleged in the pleadings.<sup>7</sup> But

<sup>1</sup> *Duyckinck v. Clinton Ins. Co.*, 23 N. J. L. 279.

<sup>2</sup> *Chitty's Pleading*, 483.

<sup>3</sup> *Cocks v. Brewer*, 11 Mees. & W. 51.

<sup>4</sup> *Howell v. Shands & Co.*, 35 Ga. 66.

<sup>5</sup> *Smith v. Smith*, 17 Ill. 482.

<sup>6</sup> *Chitty's Pleading*, 230, note c.

<sup>7</sup> *Farrar v. Carmichael*, 1 Brev. 392.

a less liberal rule prevails elsewhere in regard to matters of description. Such matters must be literally proved. Under an allegation of judgment at December term, 1830, proof cannot be admitted showing judgment at December term, 1831; nor will judgment of August 17th be admissible under allegation of August 16th.<sup>1</sup> There must be an identity of sound between the names of the parties as stated in the pleadings, and the names of the parties as shown in the record offered. An averment of judgment against *Barnard Hysinger* is not supported by a production of a record against *Barent Hysenger*.<sup>2</sup>

#### PART IV. — DEFENSES.

§ 458. **General Issue.** — A defendant, sued upon a demand, may, under the plea of the general issue, show that such demand is merged in a former judgment.<sup>3</sup> We have already, in another chapter, considered the authorities bearing on the question whether a former adjudication, put in evidence under the general issue, is conclusive upon the court or jury.<sup>4</sup> It appears to be certain that a judgment was admissible under the general issue in actions in *assumpsit*,<sup>5</sup> case,<sup>6</sup> and trover,<sup>7</sup> but was not in trespass and covenant.<sup>8</sup> Under the code a judgment cannot be given in evidence as a former recovery under the general issue, if there was an opportunity to plead it. It must be specially pleaded.<sup>9</sup> Ordinarily, an officer is protected by an execution fair on its face, and therefore, on being sued for levying upon and selling property, need not aver the existence of the judgment. But if the prop-

<sup>1</sup> *Howard v. Cousins*, 7 How. (Miss.) 114; *Gulick v. Loder*, 14 N. J. L. 572; 23 Am. Dec. 711.

<sup>2</sup> *Ducommun v. Hysinger*, 14 Ill. 249.

<sup>3</sup> *Warren v. Comings*, 6 Cush. 103; *Marah v. Pier*, 4 Rawle, 273; 26 Am. Dec. 131; *Mason v. Eldred*, 6 Wall. 231.

<sup>4</sup> See sec. 284. A judgment, whenever properly admitted in evidence under the pleadings, is as conclusive as if specially pleaded: *Gavan v. Graydon*, 41 Ind. 559.

<sup>5</sup> *Stafford v. Clark*, 1 Car. & P. 403; *Reynolds v. Stansbury*, 20 Ohio, 344; 55 Am. Dec. 459; *Stafford v. Clark*, 9 Moore, 724; 2 Bing. 377.

<sup>6</sup> *Chitty's Pleading*, 491.

<sup>7</sup> *Miller v. Manice*, 6 Hill, 114.

<sup>8</sup> 1 *Chitty's Pleading*, 488, 491, 506; *Coles v. Carter*, 6 Cow. 691.

<sup>9</sup> *Piercy v. Sabin*, 10 Cal. 22; 70 Am. Dec. 692; *Hendricks v. Decker*, 35 Barb. 298; *Brady v. Murphy*, 19 Ind. 258; *Adkins v. Hudson*, 19 Ind. 392.



erty was such as by law is exempt from execution, except for purchase-money, and the defendant wishes to prove that he levied under an execution upon a judgment for purchase-money, he must aver in his answer the existence and consideration of the judgment.<sup>1</sup>

§ 459. **Nul Tiel Record.**—This is the only proper plea to call in question the existence of the judgment as stated in the pleading of the party by whom it is brought forward. The non-existence of the judgment, or a variance in its statement in the declaration, must be taken advantage of by this plea.<sup>2</sup> It involves two questions; one of fact and the other of law. The first is, whether such a record as is alleged in fact exists. The second is, What judgment should be pronounced if the record is proved as alleged?<sup>3</sup> If the record produced shows that the court did not have jurisdiction of either the person of the defendant or the subject of the controversy, it must be disregarded.<sup>4</sup> If, on the other hand, the record does not disclose a want of jurisdiction, no extrinsic evidence can be received upon that subject under the plea of *nul tiel* record.<sup>5</sup> “As this plea only goes to the existence of the record, the defendant must plead payment or any matter in discharge of the action.”<sup>6</sup> Hence if, in an action on a judgment of a sister state, the executions are put in the record, and show a levy upon personal property, this levy and the satisfaction thereby produced cannot be taken advantage of under the plea of *nul tiel* record.<sup>7</sup> “But if a recovery be pleaded in bar, and the judgment afterwards

<sup>1</sup> *Dennis v. Snell*, 54 Barb. 411.

<sup>2</sup> *Jacquette v. Hugunon*, 2 McLean, 129; *Lincoln v. Tower*, 2 McLean, 473; *Crawford v. Ex'rs of Simonton*, 7 Port. 110; *Dudley v. Lindsey*, 9 B. Mon. 486; 50 Am. Dec. 522; *Stevens v. Fisher* 30 Vt. 200. A plea of *nul tiel* record, to an action on the judgment of a colonial court is bad in England; *Philpot v. Adams*, 7 Hurl. & N. 888; 31 L. J. Ex. 421; *Chapman v. Sherrie*, 5 L. R. Q. L. 36.

<sup>3</sup> *Maule, J.*, in *Bradley v. Gray*, 3 Com. B. 726.

<sup>4</sup> *Thompson v. Emmert*, 4 McLean, 96; *Bergen v. Williams*, 4 McLean, 125.

<sup>5</sup> *Hill v. Mendenhall*, 21 Wall. 453; *Bennett v. Morley*, 10 Ohio, 100; *ante*, sec. 455.

<sup>6</sup> *Tidd's Practice*, 851.

<sup>7</sup> *Stephens v. Roby*, 27 Miss. 744; *Tunstall v. Robinson*, Hemp. 229.

*reversed* before the day given to bring in the record, then, upon *nul tiel* record, the issue must be found for the plaintiff, because by the reversal the record is avoided *ab initio*.<sup>1</sup> Under this plea the defendant cannot prove *aliunde* that the parties or the cause of action was different in the former suit.<sup>2</sup> The plaintiff, to entitle himself to a recovery under this plea, must produce a record which does not appear, when produced, to be satisfied.<sup>3</sup>

§ 460. **Former Adjudication.**—A plea of former recovery should show that some question involved in the former judgment is identical with some issue in the present action;<sup>4</sup> that the former action and the present were between the same parties or their privies;<sup>5</sup> and in case the parties are not nominally the same, facts showing their privity with the parties to the present action must be stated.<sup>6</sup> It is not sufficient, as a general rule, to show that the question in issue in the second action might have been determined in the first. Doubts and uncertainties are resolved against the pleader, and his plea must be adjudged bad if the facts which he alleges can be conceded to exist without at the same time conceding that some question at issue in the second action must have been determined by a judgment upon the merits in the former action.<sup>7</sup> A plea of former judgment as

<sup>1</sup> Tidd's Practice, 745; citing 7 Ld. Raym. 274; 2 Ld. Raym. 1014; 2 Salk. 329. See also Kinsey v. Ford, 38 Barb. 195.

<sup>2</sup> State Bank v. Arnold, 12 Ark. 180.

<sup>3</sup> Blair v. Caldwell, 3 Mo. 353.

<sup>4</sup> Hopkinson v. Shelton, 37 Ala. 306; Lockwood v. Wildman, 13 Ohio, 450; Heatherly v. Hadly, 2 Or. 269; Johnson v. White, 13 Smedes & M. 584.

<sup>5</sup> Greely v. Smith, 1 Wood. & M. 181.

<sup>6</sup> Greely v. Smith, 3 Wood. & M. 236; Goddard v. Benson, 15 Abb. Pr. 191.

<sup>7</sup> Gilbreath v. Jones, 66 Ala. 129; Noyes v. Evans, 6 Vt. 628; 27 Am. Dec. 579; Solly v. Clayton, 12 Col. 30; Philipowaki v. Spencer, 63 Tex. 604;

Ellis v. Staples, 9 Humph. 238; Krut-singer v. Brown, 72 Ind. 466; Jourrol-man v. Massingall, 86 Tenn. 81; Andrews v. School District, 35 Minn. 70; Blackwell v. Dibbrill, 103 N. C. 270; Wilch v. Phelps, 16 Neb. 515. In Indiana, a plea of former adjudication, stating the date, court, and names of parties, and that the court had jurisdiction of the parties and the subject-matter of the suit, and that "the identical claims of the said defendant P. against the defendant R. were tried and determined by said court, and all matters of difference between them fully tried and adjudicated, and judgment rendered thereon in favor of this defendant," was held to be sufficient: Rynearson v. Parkhurst, 88 Ind. 264.

a defense to an action of ejectment should show, in addition to the facts that the parties to the two actions and the lands in controversy are the same, that the *title of the parties* in issue in the first action is the same title in issue now.<sup>1</sup> But in Ohio, in actions in relation to personalty, it is sufficient to state a prior recovery to have been between the same parties, for the same property, without averring that it was for the same conversion.<sup>2</sup> A plea of judgment recovered in a court of a foreign country must show that the judgment is *final and conclusive* between the parties in the place where it was *rendered*.<sup>3</sup> "When the record of a former judgment is set up as establishing some collateral fact involved in a subsequent controversy, it must be pleaded strictly as an estoppel, and the rule is, that such a pleading must be framed with great certainty, as it cannot be aided by an intendment. Technical estoppels, as contended by defendants, must be pleaded with great strictness, but when a former judgment is set up in bar of an action, or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters alleged in the antecedent pleading of the party."<sup>4</sup> One who desires to rely upon a former judgment as a bar must plead it, if he has an opportunity to do so.<sup>5</sup>

## PART V.

§ 461. **Judgments of the Sister States.**—It is now well settled that a judgment of a court of record of any of the states must be treated as a *record* in every other state, both by the plaintiff in his declaration<sup>6</sup> and by the de-

<sup>1</sup> Vance v. Olinger, 27 Cal. 358.

<sup>2</sup> Eversole v. Plank, 17 Ohio, 61.

<sup>3</sup> Plummer v. Woodburne, 4 Barn. & C. 625; Frayes v. Worms, 10 Com. B., N. S., 149.

<sup>4</sup> Aurora City v. West, 7 Wall. 82; Gray v. Pingry, 17 Vt. 419; 44 Am. Dec. 345; Perkins v. Walker, 19 Vt. 144.

<sup>5</sup> Briggs v. Milburr, 40 Mich. 512; Murray v. Murray, 6 Or. 26. See *ante*, sec. 283.

<sup>6</sup> Garland v. Tucker, 1 Bibb, 361; McKim v. Odom, 12 Ma. 94; India Rubber Factory v. Hoit, 14 Vt. 92; Andrews v. Montgomery, 19 Johns. 162; 10 Am. Dec. 213.

defendant in his plea.<sup>1</sup> "Pleas in bar of suits commenced on judgments of sister states must deny, by clear and positive averments, every fact which would go to show jurisdiction, whether with reference to the person or the subject-matter."<sup>2</sup> An answer to an action on a judgment of a court of record of another state is therefore insufficient if it states only that the defendant was a non-resident, and had no notice of the action, without expressly showing that he did not appear by person nor by attorney.<sup>3</sup> Where the defendant pleaded that he was never within the state, that he never had any notice of the suit, and never appeared therein, a replication "that said judgment was not recovered against defendant without his knowledge, and without notice to him in manner and form as in said plea alleged," was held to be good.<sup>4</sup> But this case seems hardly consistent with *Long v. Long*, 1 Hill, 597. There the replication alleged that defendant was *personally duly notified*, according to the rules and practice of that court and the law of that state. It was held to be "bad in substance. It states that the defendant was 'personally duly notified,' but not of *the process*, the *action*, or anything else in particular. He had due notice; but of what? The pleader has stopped short of the conclusion at which he seems to have been aiming. If due notice of the process or action had been alleged, I should still think the replication bad in substance, as well as in form. Due notice may sometimes be appropriate words in a pleading, but when the inquiry is whether a court has obtained jurisdiction of the person of the defendant, the allegation that he was 'personally notified' does not belong to legal language. The averment should be that he was served

<sup>1</sup> *Evans v. Tatem*, 9 Serg. & R. 252; *Stillman*, 4 Cow. 292; 15 Am. Dec. 11 Am. Dec. 717; *Davis v. Lane*, 2 Ind. 374.  
<sup>2</sup> 548; 54 Am. Dec. 458; *Mills v. Duryee*, 7 Cranch, 481; 2 Am. Lead Cas., 4th ed., 791.

<sup>3</sup> *Latterett v. Cook*, 1 Iowa, 1; 63 Am. Dec. 428; *Moulin v. Insurance Co.*, 24 N. J. L. 222; *Shumway v.*

*Fosterer v. Glasener*, 27 Ala. 391; *Starbuck v. Murray*, 5 Wend. 148; 21 Am. Dec. 172; *Struble v. Malone*, 3 Clarke, 586.

<sup>4</sup> *Buchanan v. Port*, 5 Ind. 284.

with process to appear and answer, or that he appeared in the action either in person or by attorney.”<sup>1</sup> In declaring upon a judgment of a justice of the peace of another state, it must be alleged that the statutes of that state gave the justice jurisdiction of the subject-matter of the suit.<sup>2</sup> “A general averment of jurisdiction is not enough. The statute giving jurisdiction to the justice, and the existence of the jurisdictional facts required by such statute, must be pleaded.”<sup>3</sup>

<sup>1</sup> Long v. Long, 1 Hill, 597.

<sup>2</sup> Sheldon v. Hopkins, 7 Wend. 435.

<sup>3</sup> Thomas v. Robinson, 3 Wend. 267.

Grant v. Bledsoe, 20 Tex. 456; Beal v. Smith, 14 Tex. 305.

## CHAPTER XX.

## SATISFACTION OF JUDGMENTS.

## PART I. — BY PAYMENT.

- § 462. To whom made.
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- § 464. Presumption of payment.
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- § 466. Paid judgment.
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## PART IV.

- § 480. Proceedings after satisfaction.
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## PART I. — BY PAYMENT.

§ 462. **To Whom Payment may be Made.** — Payment will, of course, operate as a release if made to the plaintiff,<sup>1</sup> or to any person authorized by him or by law to receive it. If there is more than one plaintiff, a payment to either will discharge the entire judgment.<sup>2</sup> If,

<sup>1</sup> *Atkinson v. Cooper*, 2 Humph. 361; *Freeman on Cotenancy and Partition*, Lamar v. Follmer, 4 Watts & S. 9. secs. 178, 179; *Freeman on Executions*,

<sup>2</sup> *Erwin v. Rutherford*, 1 Yerg. 169; sec. 442.

however, it is shown by the record, or by any means brought to the knowledge of the debtor, that the judgment was recovered for the use of another than the plaintiff, it can only be satisfied by payment to the real party in interest;<sup>1</sup> and a payment to such party necessarily satisfies the judgment, though it was recovered in the name of another person.<sup>2</sup> So if a judgment is assigned, the plaintiff is no longer a proper person to receive payment; and a payment to him thereafter does not extinguish the judgment, if it can be shown to have been made with notice of the assignment. Direct notice to the defendant is not essential to protect the rights of the assignee. It is sufficient if it can be shown that the former had information given in such terms and under such circumstances as were well calculated to arrest his attention.<sup>3</sup> But a payment made to the original judgment creditor operates as a satisfaction of the judgment, if made in good faith, though it had been previously assigned to another, of which fact the debtor had no notice.<sup>4</sup>

An attorney at law retained to prosecute a demand has, by virtue of that retainer, authority to receive payment of the judgment when recovered. Until the defendant has notice of a revocation of this authority, he will be entitled to the credit of all payments made to the attorney.<sup>5</sup> The relation of a *prochein ami* to the action is that of an officer of the court specially appointed to enforce and preserve the rights of the infant in whose behalf he acts. He may employ an attorney, carry the suit on to judgment, and may, if there is no regularly constituted guardian of the infant, receive the money recovered of the defendant, and thereupon may enter a valid satisfaction

<sup>1</sup> *Triplet v. Scott*, 12 Ill. 137; *Hodson v. McConnel*, 12 Ill. 170; *Thatcher v. Rockwell*, 4 Cal. 375; *Zantsinger v. Old*, 2 Dall. 265.

<sup>2</sup> *Matter of Phillips*, 52 Iowa, 232.

<sup>3</sup> *Guthrie v. Bashline*, 25 Pa. St. 80.

<sup>4</sup> *The Lulie D.*, 4 Biss. 249; *Seymour v. Smith*, 17 Abb. N. C. 387.

<sup>5</sup> *Harper v. Harvey*, 4 W. Va. 539;

*Yoakum v. Tilden*, 3 W. Va. 167; 100 Am. Dec. 738; *Wilkinson & Co. v. Holloway*, 7 Leigh, 277; *Mills v. Chandler*, 9 Rep. 808; *Brackett v. Norton*, 4 Conn. 517; 10 Am. Dec. 179; *Kirk's Appeal*, 87 Pa. St. 243; 30 Am. Rep. 357; *Haden v. Walker*, 5 Ala. 86; *Rogers v. McKensie*, 81 N. C. 164; *Miller v. Scott*, 21 Ark. 396.

of the judgment.<sup>1</sup> The attorney who is employed by the *prochein ami* to prosecute the suit is thereby authorized to receive payment of the judgment, and to enter satisfaction thereof when such payment is made.<sup>2</sup> Though the judgment has been assigned, if the assignee acquiesces in the acts of the attorney for plaintiff in issuing execution and proceeding to enforce its collection, he is bound by payment made to such attorney.<sup>3</sup>

Various officers, such as the sheriff or the clerk of the court, are authorized to receive payment of judgments in certain contingencies. When these contingencies exist, payment to an officer authorized to receive it is an absolute satisfaction of a judgment, although he subsequently embezzles the money so paid, and no part of it is ever received by the judgment creditor.<sup>4</sup> If, on the other hand, the officer to whom payment is made is not at the time authorized to receive it by virtue of his office, it is entirely inoperative, and does not satisfy the judgment.<sup>5</sup> Thus though a sheriff is entitled to receive payment of a judgment when a writ is in his hands, under which he is authorized to levy upon and sell property to satisfy it, he has, in the absence of such writ, no authority to represent the plaintiff. Therefore payment to him before such writ has issued,<sup>6</sup> or after the return day thereof,<sup>7</sup> where he has not before that time levied upon property to satisfy it, cannot be regarded as made to him officially, and does not satisfy the judgment, unless it is received from him by the judg-

<sup>1</sup> *White v. Hall*, Moore K. B. 852; *Mills v. Allen*, 7 Jones, 564; *Bynum v. Morgan v. Thorne*, 7 Mees. & W. 400; *Barefoot*, 75 N. C. 576; *Hawkeye Ins. Co. v. Lucknow*, 76 Iowa, 21.

<sup>2</sup> *Collins v. Brook*, 4 Hurl. & N. 270; 5 Hurl. & N. 700; 29 L. J. Ex. 259; 6 Jur., N. S., 999.

<sup>3</sup> *Baltimore etc. R. R. Co. v. Fitzpatrick*, 36 Md. 624.

<sup>4</sup> *Gill v. Truelson*, 39 Minn. 373.

<sup>5</sup> *Beard v. Melliken*, 68 Ind. 231; *Planters' Bank v. Spencer*, 3 Smedes & M. 305; *Banks v. Evans*, 10 Smedes & M. 35; 48 Am. Dec. 734; *O'Neill v. Lusk*, 1 Bail. 220.

<sup>6</sup> *Bank of Georgetown v. Ault*, 31 Ga. 350; *Brier v. Woodbury*, 1 Pick. 362; *Bailey v. Hester*, 101 N. C. 538;

*Mills v. Allen*, 7 Jones, 564; *Bynum v. Barefoot*, 75 N. C. 576; *Hawkeye Ins. Co. v. Lucknow*, 76 Iowa, 21.

<sup>7</sup> *Irwin v. McKee*, 25 Ga. 646; *Bobo v. Thompson*, 3 Stew. & P. 385.

<sup>8</sup> *Wyer v. Andrews*, 13 Me. 168; 29 Am. Dec. 497; *Lofland v. Jefferson*, 4 Harr. (Del.) 303; *Harris v. Ellis*, 30 Tex. 4; 94 Am. Dec. 296; *Grandstaff v. Ridgeley*, 30 Gratt. 1; *Chapman v. Cowles*, 41 Ala. 103; 91 Am. Dec. 508; *Williams v. Williamson*, 6 Ired. 231; 45 Am. Dec. 494; *Freeman on Executions*, secs. 106, 442. *Contra*, *James v. Yates*, 3 Met. (Ky.) 343.



ment creditor. But it has been held that if a clerk of the court, having authority in his official capacity to receive payments of judgments, receives money to pay the debt, before judgment, when he has no authority to receive it, and retains the money until after judgment, and then writes on the record the word "settled," this will be held to indicate an intention to hold the money in his official capacity, and will be regarded as a satisfaction of the judgment.<sup>1</sup>

§ 463. **How Payment may be Made.**—The plaintiff may accept payment in any manner or in any kind of currency; and having once accepted currency, note, check, or any other article of value as a substitute for a legal tender, cannot revoke his acceptance and enforce payment in money.<sup>2</sup> The mere taking of a note for a pre-existing debt does not, of itself, amount to a payment. Hence the giving of a note will not operate as a satisfaction of a judgment, unless it is shown that the plaintiff accepted it in payment, and not as additional evidence of the same debt.<sup>3</sup> Upon making such showing, however, the judgment must be treated as satisfied for all purposes, and to the same extent as if payment had been made in money.<sup>4</sup>

Whether the plaintiff is bound by an agreement under which he obtains part payment through his promise to satisfy the whole judgment is a disputed question. On the one side it is insisted that the agreement to discharge any portion in excess of the payment is a *nudum pactum*, and cannot therefore extinguish the entire judgment.<sup>5</sup> On the other side, it is affirmed with great confidence that the plaintiff cannot retain the fruits of his compro-

<sup>1</sup> Governor v. Read, 38 Ala. 254.

<sup>2</sup> Lyon v. Northrop, 17 Iowa, 314; Weston v. Clark, 37 Mo. 572; Witherby v. Mann, 11 Johns. 518; Ives v. Phelps, 16 Minn. 451.

<sup>3</sup> McCoy v. Hazlett, 14 Kan. 430; Riggs v. Goodrich, 74 Mo. 108; Schneider v. Meyer, 56 Mo. 475.

<sup>4</sup> Shields v. Moore, 84 Ind. 440;

Kusler v. Crofoot, 78 Ind. 597.

<sup>5</sup> Deland v. Hiatt, 27 Cal. 611; 87 Am. Dec. 102; Garvey v. Jarvis, 54 Barb. 179; Weber v. Couch, 134 Mass. 28; 45 Am. Rep. 274; Fletcher v. Wurgler, 97 Ind. 223; Knight v. Cherry, 64 Mo. 513.

mise, and at the same time enforce his judgment as to the part agreed to be released.<sup>1</sup> But a satisfaction *under seal* is good, though full payment was not made.<sup>2</sup> If a judgment creditor accepts a sum of money and other property, real or personal, in full satisfaction of his judgment, he cannot avoid such satisfaction on the ground that the money and property do not together equal in value the amount of the judgment.<sup>3</sup> If the debtor has the right to appeal, so that the judgment is not a finality, and its correctness is not conceded, an agreement between him and his creditor that the latter will accept a sum less than the amount of the judgment if the former will not prosecute an appeal is valid and enforceable.<sup>4</sup> And generally, where the rights of the parties are doubtful and may be the subject of further controversy, they may compromise, and settle their disputes, and as a part of such compromise agree that the judgment shall be discharged on the payment of a sum less than the amount thereof, and such agreement, when executed by the debtor, is obligatory on the creditor.<sup>5</sup>

An attorney at law has, by virtue of his general retainer, no authority to satisfy a judgment without payment of the *full amount in money*. If he compromises by taking less than the entire sum due, or by receiving anything *else than money*, the plaintiff is not bound by the compromise.<sup>6</sup> In England, the retainer and authority of an attorney cease at the entry of the judgment; and he cannot, by virtue of an implied authority arising from

<sup>1</sup> Harper v. Graham, 20 Ohio, 106; Reed v. Hibbard, 6 Wis. 175.

<sup>2</sup> Beers v. Hendrickson, 45 N. Y. 665.

<sup>3</sup> Neal v. Handley, 116 Ill. 418; 56 Am. Rep. 784; Booth v. Campbell, 15 Md. 569.

<sup>4</sup> Clay v. Hoywadt, 8 Kan. 74; Case v. Hawkins, 53 Miss. 702; Hendrick v. Thomas, 106 Pa. St. 327.

<sup>5</sup> Walrath v. Walrath, 27 Kan. 395.

<sup>6</sup> Garthwaite v. Wents, 19 La. Ann. 196; Lewis v. Woodruff, 15 How. Pr. 539; Benedict v. Smith, 10 Paige, 126; Beers v. Hendrickson, 45 N. Y. 665;

Jackson v. Bartlett, 8 Johns. 361;

Wilkinson v. Holloway, 7 Leigh, 277;

Wakeman v. Jones, 1 Ind. 517; Chap-

man v. Cowles, 41 Ala. 103; 91 Am.

Dec. 508; Jones v. Ransom, 3 Ind. 327;

Abbe v. Rood, 6 McLean, 107; Jewett

v. Wardleigh, 32 Me. 110; Vail v.

Conant, 15 Vt. 314; Lewis v. Gramage,

1 Pick. 347; Smock v. Dade, 5 Rand.

639; 16 Am. Dec. 780; McCarver v.

Nealey, 1 Iowa, 360; Trumbull v.

Nicholson, 27 Ill. 149; Portis v. Ennis,

27 Tex. 574; Kenny v. Haseltine, 6

Humph. 63.

his previous relation to the case, make a binding agreement to stay the execution, nor affect a valid compromise of the judgment.<sup>1</sup> But if he is employed after judgment to conduct proceedings to enforce satisfaction thereof, such employment authorizes him to bind his client by a compromise.<sup>2</sup> The burden of showing that an attorney was authorized to accept anything but money is upon the party making such payment. No such authority will be presumed.<sup>3</sup> Where the law authorizes the sheriff or any other officer to accept payments of judgments, his authority is as limited as that of an attorney acting under a general retainer.<sup>4</sup> The return of a sheriff, indorsed on an execution, that he returns it satisfied by taking two notes, etc., does not establish, *prima facie*, a satisfaction of the judgment; for though the plaintiff may have assented to the taking of the notes, this certificate does not prove such assent.<sup>5</sup> In Louisiana, while that state was under the control of the authorities of the confederate states, and confederate notes were the circulating medium, a plaintiff had execution issued on his judgment, and caused the sheriff to enforce the same. The debtor's property was sold by the sheriff, who received the purchase-money in confederate notes. The plaintiff never called for these notes; but after the occupation of the state by the federal forces, he endeavored to compel the sheriff to pay in lawful money of the United States the price realized at the sale. The supreme court of that state gave the following reasons for denying the plaintiff's demand: "The plaintiff resided in New Orleans, and he must be presumed to have known that no other currency was in general circulation; and we cannot resist the conviction that by placing the writ in the hands of the sheriff to sell the property of his

<sup>1</sup> Lovegood v. White, L. R. 6 Com. P. 614; Crutchfield v. Robins, 5 Humph. 440; Butler v. Knight, L. R. 2 Ex. 109. 15; 42 Am. Dec. 417; Dibble v. Briggs, 28 Ill. 48; Harris v. Ellis, 30 Tex. 4; <sup>2</sup> Butler v. Knight, L. R. 2 Ex. 109. 94 Am. Dec. 296; Cooney v. Wade, 4 <sup>3</sup> Portis v. Ennis, 27 Tex. 574. Humph. 440; 40 Am. Dec. 657. <sup>4</sup> Mitchell v. Hackett, 14 Cal. 661; Ellis v. Smith, 42 Ala. 349; Aicardi v. Robbins, 41 Ala. 641; 94 Am. Dec. 85 Am. Dec. 151. <sup>5</sup> Mitchell v. Hockett, 25 Cal. 539;

debtor he authorized him to receive confederate treasury notes for the price. We know from the history of the times that the sheriff could not have demanded with safety any other money in payment of the price of property sold at public auction, and that he could not have enforced the payment of any kind of money at that time, and still he was obliged to execute the writ. The demand of the plaintiff is without equity."<sup>1</sup> But in Alabama an administrator who in 1863 paid to his successor in office, in confederate notes, the amount of a decree entered against him in 1860 was held to have produced "no satisfaction of the decree, in whole or in part."<sup>2</sup>

Sometimes it has been decided, when bank bills were in general circulation as money, that the acceptance of them by the creditor's attorney, or by a sheriff, clerk, or other officer empowered by law to receive payment of a judgment, was binding upon the plaintiff, and therefore operated as a satisfaction,<sup>3</sup> unless the plaintiff gave notice before payment was made that he would not accept anything but lawful money.<sup>4</sup> But clearly it is the duty of an attorney or officer to exact payment only in lawful money, though the plaintiff does not expressly notify him that the performance of such duty will not be waived; this duty being a legal one, both the attorney or officer and the judgment debtor must take notice of it, and neither has any right to assume that the plaintiff will accept something else as equivalent to its performance. Therefore an acceptance of bank bills, unless ratified by the plaintiff in express terms or by his acquiescence,<sup>5</sup> is not a satisfaction of a judgment.<sup>6</sup>

<sup>1</sup> *Harvey v. Walden*, 23 La. Ann. 62 N. C. 31; *Uiley v. Young*, 68 N. C. 162. To the same effect, *Boyd v. Sales*, 39 Ga. 72. 387; *Crutchfield v. Robbins*, 5 Humph. 15; 42 Am. Dec. 417.

<sup>2</sup> *Thompson v. Perryman*, 45 Ala. 620; *Aicardi v. Robbins*, 41 Ala. 541; 94 Am. Dec. 614.

<sup>3</sup> *Laird v. Folwell*, 10 Heisk. 62; *Crutchfield v. Robbins*, 5 Humph. 15; 42 Am. Dec. 417.

<sup>4</sup> *Governor v. Carter*, 3 Hawks, 328; 14 Am. Dec. 588; *Atkin v. Mooney*,

<sup>5</sup> *Prewett v. Standifer*, 8 Smedes & M. 493; *McKay v. Smitherman*, 64 N. C. 47.

<sup>6</sup> *Gasquet v. Warren*, 2 Smedes & M. 514; *Aicardi v. Robbins*, 41 Ala. 541; 94 Am. Dec. 614; *Railey v. Bagley*, 19 La. Ann. 172; *Coxe v. State Bank*, 8 N. J. L. 172; 14 Am. Dec. 417;

§ 464. **Presumption of Payment.**—At common law, every judgment was presumed to be paid after the lapse of twenty years, and this rule has been adopted in many of the states, either by their adoption of the common law or by statutes of similar import respecting this subject.<sup>1</sup> In Maine, Missouri,<sup>2</sup> and in Massachusetts, and perhaps in other parts of the United States, statutes have been enacted on this subject in substantial conformity to the common law. In the states named, the statute provided that every judgment should be presumed to be paid after twenty years from the period when any duty or obligation accrued thereunder. In Tennessee the period was reduced to sixteen years, apparently by a piece of judicial legislation made early in the history of that state, and ever afterward recognized and enforced by its courts.<sup>3</sup> But whether existing under the common law or under the statutes referred to, or by virtue of rules adopted by any court, this presumption was never conclusive. It only threw upon the party seeking to enforce his judgment, after twenty years of inaction, the burden of showing that it remained unpaid.<sup>4</sup> The presumption is overcome if it "be made to appear that the plaintiff has used diligence to enforce the judgment, or that the defendant has paid interest, or otherwise acknowledged it."<sup>5</sup> What is

*Sinclair v. Piercy*, 5 J. J. Marsh. 64; *Chapman v. Cowles*, 41 Ala. 103; 91 Am. Dec. 508; *Holt v. Robinson*, 21 Ala. 100; 56 Am. Dec. 240; *Randolph v. Ringgold*, 10 Ark. 279; 52 Am. Dec. 235.

<sup>1</sup> *Miller v. Smith's Ex'rs*, 16 Wend. 425; *Cope v. Humphries*, 14 Serg. & R. 15; 1 Greenl. Ev., sec. 39; *State of Tennessee v. Virgin*, 36 Ga. 390; *Willingham v. Long*, 47 Ga. 545; *Bentley's Appeal*, 99 Pa. St. 500; *Phillips v. Adams*, 78 Ala. 225; *Robinson v. Milby*, 2 Houst. 387; *Lash v. Von Neida*, 109 Pa. St. 207; *Thomas v. Hunnicutt*, 54 Ga. 337; *White v. Moore*, 23 S. C. 456; *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. St. Rep. 804; *Alston v. Hawkins*, 105 N. C. 3; 18 Am. St. Rep. 874, and note; *Barnard v. Onderdonk*, 11 Abb. N. C.

349; *Hendricks v. Wallis*, 7 Iowa, 224; *Bright v. Sexton*, 18 Ind. 186; *Beekman v. Hamlin*, 19 Or. 383; 20 Am. St. Rep. 827; *Van Loon v. Smith*, 103 Pa. St. 238; *Chapman v. Loomis*, 36 Conn. 459.

<sup>2</sup> *Gaines v. Miller*, 111 U. S. 399; *Chalmers v. Wilkinson*, 10 Mo. 98.

<sup>3</sup> *Blackburn v. Squib, Peck*, 64; *McDaniel v. Goodall*, 2 Cold. 391; *Anderson v. Settle*, 5 Sneed, 202.

<sup>4</sup> *Knight v. Macomber*, 55 Me. 132; *Brewer v. Thomas*, 28 Me. 81; *Denny v. Eddy*, 22 Pick. 533; *Bissell v. Jaudon*, 16 Ohio St. 498; *Anderson v. Settle*, 5 Sneed, 202; *Yarnell v. Moore*, 3 Cold. 173; *Tobin v. Meyers*, 18 S. C. 324; *Walker v. Robinson*, 136 Mass. 280; *Scott v. Isaacs*, 85 Va. 712.

<sup>5</sup> *Burt v. Casey*, 10 Ga. 179.

sufficient to rebut the presumption of payment arising from lapse of time is a question which, like all other questions of fact, is very much within the discretion of the court or jury. Lord Ellenborough, in a case decided by him,<sup>1</sup> held that this presumption was not overthrown by proof that the defendant was, during the whole time, in indigent circumstances; that he was most of the time abroad; that while in England he lived under an assumed name; and that, in the opinion of his friends, he was never possessed of means sufficient to pay the judgment. None of the American cases carry this presumption so far. Proof that three executions were issued and returned unsatisfied, that the debtor stated that he was unable to pay, and that he put his property out of his hands, and was reputed to be insolvent, sufficiently rebuts the presumption of payment.<sup>2</sup> Proof of partial payments during the twenty years, or of any acknowledgment of the continuing obligation of the judgment, is also sufficient.<sup>3</sup> The verdict of a jury, finding that a judgment is unpaid, is sufficiently sustained by proof of the insolvency of the defendant, or of his relationship with plaintiff, or of *any other circumstance* calculated to satisfy the minds of the jurors that the judgment is still due.<sup>4</sup>

There are decisions justifying the inference, when particular facts are conceded or are established by undisputed evidence, that the question whether the presumption of payment has been rebutted is a question of law for the court.<sup>5</sup> Undoubtedly there may be cases in which the court must declare that the evidence offered does not tend to rebut the presumption, and other cases in which it is equally clear that the presumption has been rebutted and that the court should so declare. Nevertheless, the

<sup>1</sup> *Willaume v. Gorges*, 1 Camp. 217.

<sup>2</sup> *Knight v. Macomber*, 55 Me. 132.

<sup>3</sup> *Denny v. Eddy*, 22 Pick. 533; *Bissell v. Jaudon*, 16 Ohio St. 498; *Mower v. Kip*, 2 Edw. Ch. 165.

<sup>4</sup> *Yarnell v. Moore*, 3 Cold. 173; *Boardman v. De Forest*, 5 Conn. 8.

<sup>5</sup> *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. St. Rep. 804; *Reed v. Reed*, 46 Pa. St. 239; *Alston v. Hawkins*, 105 N. C. 3; 18 Am. St. Rep. 874; *Beekman v. Hamlin*, 19 Or. 333; 20 Am. St. Rep. 827.

question is one of fact rather than of law, and when competent evidence has been submitted to the jury, tending to rebut the presumption, it is for them to find that the judgment has or has not been paid, and their finding, when supported by such evidence, is conclusive, unless the court chooses to set aside their verdict on motion for a new trial, and to submit the question to another jury. The admission that a judgment has not been paid, made either in express terms or by making partial payments thereon, clearly rebuts the presumption of payment.<sup>1</sup> If the plaintiff was prevented from compelling the payment of his judgment by an injunction against him, no presumption of payment can arise during the time when such injunction was in operation.<sup>2</sup> The financial circumstance of the defendant may be taken into consideration. The fact that he failed in business or was insolvent at any particular time is not sufficient to rebut the presumption of payment, if there were other times during the twenty years when he was able to pay, and when payment from him could have been compelled.<sup>3</sup> If, however, he was insolvent and unable to pay during the whole term of twenty years, the jury may, and perhaps ought to, infer that the judgment has not been paid.<sup>4</sup> So the insanity of the defendant,<sup>5</sup> the near relationship of the parties,<sup>6</sup> the existence of war, preventing the creditor from maintaining suit,<sup>7</sup> the issue of execution and its return unsatisfied,<sup>8</sup> may all be taken into consideration by the jury, as rebutting the presumption of payment. This presumption is not overcome by *ex parte* renewals of the judgment by *scire facias* a short time prior to the expira-

<sup>1</sup> *Burton v. Cannon*, 5 Harr. (Del.)

13; *Bissell v. Jaudon*, 16 Ohio St. 498.

<sup>2</sup> *Hutsonpillar v. Stover*, 12 Gratt.

579.

<sup>3</sup> *Jackson v. Nason*, 38 Me. 85.

<sup>4</sup> *Taylor v. Megargee*, 2 Pa. St. 225;

*Robinson v. Milby*, 2 Houst. 387;

*Waddell v. Elmendorf*, 10 N. Y. 170;

*Farmers' Bank v. Leonard*, 4 Harr. (Del.)

536; *McLellan v. Crofton*, 6 Me. 307;

*Alston v. Hawkins*, 105 N. C. 3; 18

Am. St. Rep. 874; *McKinder v. Littleton*, 4 Ired. 193; *Grant v. Burgwya*, 84 N. C. 560.

<sup>5</sup> *McLellan v. Crofton*, 6 Me. 334.

<sup>6</sup> *Wanmaker v. Van Buskirk*, 1 N. J.

Eq. 685; 23 Am. Dec. 748.

<sup>7</sup> *Hale v. Pack*, 16 W. Va. 145;

*Bailey v. Jackson*, 16 Johns. 210; 8

Am. Dec. 309; *Dunlap v. Ball*, 2

Cranch, 184.

<sup>8</sup> *Black v. Carpenter*, 3 Baxt. 350.

tion of the twenty years,<sup>1</sup> nor by the pendency of a *scire facias* to revive the judgment, which has never been determined.<sup>2</sup> In Oregon, and perhaps in some other states, the presumption of payment after twenty years is treated very much as if a statute of limitations had interposed, and cannot be overcome otherwise than by showing a recognition of indebtedness on the part of the defendant, or some act or admission on his part inconsistent with his having paid the judgment.<sup>3</sup>

§ 465. **Time as Evidence of Payment.**—"Presumptions are founded on the ordinary course of things. It is not usual for a creditor to delay enforcing the payment of a debt due him for such a length of time. The fact that he does so evinces a consciousness that it was not owing, and creates a strong presumption of payment."<sup>4</sup> This is an extract from the opinion of the supreme court of Tennessee in a case in which that court held that after the lapse of seven years, during which no effort was made to collect a judgment, the jury might properly consider this long period of inactivity as a circumstance to be weighed by them in determining whether the judgment remained unpaid. In a later case in the same state, proof that the plaintiff resided for thirteen years in the same neighborhood with his judgment debtor, during all that time making no attempt to collect his judgment; that plaintiff then moved away, without any attempt at collection; and that the defendant all the time had ample property to satisfy the judgment,—was held to create a presumption of payment, though the period of sixteen years allowed by the law of that state had not yet elapsed.<sup>5</sup> While the presumption of payment based upon lapse of time alone is an arbitrary presumption not created by any less than

<sup>1</sup> *Tobin v. Myers*, 18 S. C. 324.

<sup>2</sup> *Van Loon v. Smith*, 103 Pa. St. 238; *Biddle v. Girard Bank*, 109 Pa. St. 349.

<sup>3</sup> *Beekman v. Hamlin*, 19 Or. 383; 20 Am. St. Rep. 827. See also *Lyon*

*v. Adde*, 63 Barb. 89; *Cheever v. Perley*, 11 Allen, 584; *Summerville v. Holliday*, 1 Watts, 507.

<sup>4</sup> *Leiper v. Erden*, 5 Yerg. 97.

<sup>5</sup> *Husky v. Maples*, 2 Cold. 25; 88 Am. Dec. 588.



the full term provided by law, still there is no doubt that the lapse of a long period of time, though less than the full term of limitation, is a proper circumstance for the *consideration of the jury*, and if, in connection with other circumstances, it produces the conviction that the judgment has been paid, they will be justified in returning a verdict to that effect.<sup>1</sup>

§ 466. **Paid Judgment.**—Payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement,<sup>2</sup> nor kept on foot to cover new and distinct engagements;<sup>3</sup> and when the payment is made by one primarily liable, it is an absolute satisfaction, notwithstanding he takes an assignment of such judgment, and an agreement that it shall be kept alive for his benefit,<sup>4</sup> or gives the money to a third person with which to purchase the judgment and to take an assignment in the name of the latter.<sup>5</sup> But in England the rule seems to be different. A defendant there confessed judgment for five hundred pounds. The debt due from him to the plaintiff was subsequently increased to one thousand pounds. It was then agreed that the last-named sum might be paid in installments, for which the judgment should stand as security. It was held that neither the defendant nor his grantee with notice could satisfy the judgment by paying the five hundred pounds, or any sum less than the whole amount for which the

<sup>1</sup> *Baker v. Stonebraker's Adm'r*, 36 Mo. 338; *Wherry v. McCammon*, 12 Rich. Eq. 337; 91 Am. Dec. 240; *Winstanly v. Savage*, 2 McCord Eq. 435; *Goldhawk v. Duane*, 2 Wash. C. C. 323; *Thompson v. Thompson*, 2 Head, 405; *Kinsler v. Holmes*, 2 S. C., N. S., 483; *Ronwick v. Wheeler*, 4 McCrary, 119; *Briggs's Appeal*, 93 Pa. St. 485; *West v. Brison*, 99 Mo. 684.

<sup>2</sup> *Marvin v. Vedder*, 5 Cow. 671; *Winslow v. Clark*, 2 Lana. 380; *Averill v. Loucks*, 6 Barb. 19; *De la Vergne v. Evertson*, 1 Paige, 181; 19 Am. Dec. 411; *Simpson v. Mercer*, 144 Mass. 413.

<sup>3</sup> *Troup v. Wood*, 4 Johns. Ch. 228.

In Pennsylvania, the parties to a judgment, though it has been paid, may keep it alive as a security for other obligations: *Pierce v. Black*, 105 Pa. St. 342; *Milligan's Appeal*, 104 Pa. St. 103.

<sup>4</sup> *Montgomery v. Vickery*, 110 Ind. 211; *Birke v. Abbott*, 103 Ind. 1; 53 Am. Rep. 474; *Hogan v. Reynolds*, 21 Ala. 56; 56 Am. Dec. 236; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Booth v. Farmers' & M. Bank*, 74 N. Y. 223; *Fowler v. Smith*, 10 S. E. Rep. 93 (S. C.).

<sup>5</sup> *Shaw v. Clark*, 6 Vt. 507; 27 Am. Dec. 578.

defendant had agreed that it might stand as security.<sup>1</sup> If a judgment is confessed for the purpose of securing future advances, and such advances, afterwards made to the amount of the judgment, are paid by the debtor, the judgment, as against subsequent purchasers or encumbrancers, is *functus officio*. It cannot stand as a continuing security for further advances, nor for the final balance of current account between the parties.<sup>2</sup> The fees of the sheriff on execution are no part of the judgment. They constitute a demand against the party for whom the services are performed. If the judgment is paid, the sheriff's authority is extinguished, and he cannot lawfully proceed to levy upon property to enforce the collection of his costs.<sup>3</sup> But an entry on a docket acknowledging the payment of the debt and interest does not satisfy the whole judgment. It may be revived by *scire facias* against a terre-tenant to collect the costs recovered by plaintiff as a part of his judgment.<sup>4</sup>

§ 467. By Payment of Another Judgment.—Sometimes, as where a tort is committed by several, separate judgments may be rendered against two or more persons in actions by the injured party to recover the damages suffered by him. The judgments may be for different amounts, but because they are founded upon the same cause of action, the satisfaction of one, whether complete or partial, operates to the same extent as a satisfaction of the other.<sup>5</sup> But whenever a plaintiff has two or more judgments founded on the same cause of action, it is said that he may elect which judgment he will enforce, and therefore of which he will receive satisfaction.<sup>6</sup> The

<sup>1</sup> *Crafts v. Wilkinson*, 4 Ad. & E., N. S., 74.

<sup>2</sup> *Truscott v. King*, 6 N. Y. 147.

<sup>3</sup> *Jackson v. Anderson*, 4 Wend. 474; *Craft v. Merrill*, 14 N. Y. 456.

<sup>4</sup> *Altman v. Klingensmith*, 6 Watts, 445.

<sup>5</sup> *Sherman v. Brett*, 7 Wis. 139; *Jones v. Ranson*, 3 Ind. 327; *Thompson v. Percival*, 5 Barn. & Adol. 925;

*First Nat. Bank v. Indianapolis P. Co.*, 45 Ind. 5; *Woods v. Pangburn*, 75 N. Y. 496; *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628; *Knapp v. Roche*, 94 N. Y. 329.

<sup>6</sup> *Bell v. Perry*, 43 Iowa, 372; *Putney v. O'Brien*, 53 Iowa, 117; *Cox v. Smith*, 10 Or. 418; *Livingston v. Bishop*, 1 Johns. 290; 3 Am. Dec. 330.

same rule applies to judgments in actions *ex contractu*. If an obligation is such as to warrant separate judgments against several persons thereon for the same breach of contract, and plaintiff accepts satisfaction of either, he satisfies all.<sup>1</sup> If, of two such judgments, one appears to be satisfied and the other not, and the satisfaction was inadvertently entered, it may be vacated as against one who claims to be an innocent purchaser. He cannot maintain such claim as against the judgment, satisfaction of which has not been entered of record.<sup>2</sup> If a judgment is entered on an original obligation, and another judgment is entered upon an obligation given as collateral security to the first, the payment of either judgment discharges the other; and a sale made under the latter after it is so satisfied is void.<sup>3</sup> And in the states where, though a plaintiff is allowed to maintain separate actions against each of several tort-feasors, his taking out execution against either is regarded as an irrevocable election to pursue that one only; such election is a satisfaction of all the judgments against the other tort-feasors.<sup>4</sup> If judgment is entered against a principal debtor and against a garnishee, the satisfaction of the former satisfies the latter,<sup>5</sup> and a satisfaction of the latter satisfies the former to the extent of the moneys paid.<sup>6</sup> If separate judgments are recovered against persons severally answerable for the same wrong, or upon the same contract, each remains liable for the costs of the action against him, and is not released from this liability by the payment of the judgment and costs in any other action.<sup>7</sup> Hence if, where there are two judgments for the same debt, one is appealed from and affirmed, with damages, the payment of the other judgment does not release these damages.<sup>8</sup>

<sup>1</sup> Cox v. Smith, 10 Or. 418; Bowser's Appeal, 101 Pa. St. 466; Bank v. Mosely, 1 Strob. 414.

<sup>2</sup> Burgett v. Paxton, 99 Ill. 288.

<sup>3</sup> Craft v. Merrill, 14 N. Y. 456.

<sup>4</sup> Boardman v. Acer, 13 Mich. 77; 87 Am. Dec. 786.

<sup>5</sup> Hammett v. Morris, 55 Ga. 664.

<sup>6</sup> Matter of Phillips, 52 Iowa, 232.

<sup>7</sup> Windham v. Wither, Strange, 515; Livingston v. Bishop, 1 Johns. 290; 3 Am. Dec. 330.

<sup>8</sup> Thompson v. Sasaiter, 86 Ala. 536.

§ 467 a. *Set-off.* — The satisfaction of a judgment may be wholly or partly produced by compelling the judgment creditor to accept in payment a judgment against him in favor of the judgment debtor; or in other words, by setting off one judgment against another. This is usually brought about by a motion in behalf of the party who desires to have his judgment credited upon or set off against a judgment against him. The court in a proper case will grant the motion. Its power to do this cannot be traced to any particular statute, and exists only in virtue of its general equitable authority over its officers and suitors.<sup>1</sup> This authority was formerly restricted to courts of equity, but is now very generally exercised by courts of law. The judgments sought to be set off against each other may have been rendered in the same or in different courts. In the first case there can be no difficulty; but in the latter it has sometimes been held that a court of law was inadequate to afford relief, and that resort to chancery was therefore unavoidable.<sup>2</sup> This position is believed to be untenable. The court of law in which the judgment is entered can give relief, by virtue of its equitable power, and may direct that the judgment of another court be credited *upon* or *set off* against *its* judgment,<sup>3</sup> except when the rights of the parties are too intricate and complicated to be adjusted elsewhere than in equity.<sup>4</sup> This exception is, however, but a recog-

<sup>1</sup> *Chandler v. Drew*, 6 N. H. 469; 26 Am. Dec. 704; *Hutchins v. Riddle*, 12 N. H. 464; *Hund v. Fogg*, 22 N. H. 98; *Brown v. Warren*, 43 N. H. 430; *Burns v. Thornburgh*, 3 Watts, 78; *Simpson v. Hart*, 14 Johns. 63; 1 Johns. Ch. 91; *Stilwell v. Carpenter*, 2 Abb. N. C. 238; *Skrine v. Simmons*, 36 Ga. 402; 91 Am. Dec. 771; *Ballinger v. Tarbell*, 16 Iowa, 491; 85 Am. Dec. 527; *Prior v. Richarda*, 4 Bibb, 356; *Williams v. Evans*, 2 McCord, 203; *Duncan v. Bloomstock*, 2 McCord, 318; 13 Am. Dec. 723; *Brown v. Hendrickson*, 39 N. J. L. 239; *Ames v. Bates*, 119 Mass. 397; *Quick v. Durham*, 115 Ind. 302.

<sup>2</sup> *Webster v. McDaniel*, 2 Del. Ch. 297.

<sup>3</sup> *Duncan v. Bloomstock*, 2 McCord, 318; 13 Am. Dec. 723; *Schermerhorn v. Schermerhorn*, 3 Caines, 190; *Ewen v. Terry*, 8 Cow. 126; *Kimball v. Munger*, 2 Hill, 364; *Brown v. Hendrickson*, 39 N. J. L. 239; *Best v. Lawson*, 1 Miles, 11; *Coxe v. State Bank*, 8 N. J. L. 172; 14 Am. Dec. 417; *Pierce v. Bent*, 69 Me. 381; *McEwen v. Bigelow*, 40 Mich. 215; *Hovey v. Morrill*, 61 N. H. 9; 60 Am. Rep. 315; *Rix v. Nevins*, 26 Vt. 384; *People v. N. Y. Common Pleas*, 13 Wend. 849; 28 Am. Dec. 495; *Sneed v. Sneed*, 14 Lea, 13.

<sup>4</sup> *Story v. Fatten*, 3 Wend. 331.

nition of the general principle, everywhere conceded, that the setting off of one judgment against another rests in the sound discretion of the court, and will not be compelled except when by so doing the court can accomplish substantial justice between the parties.<sup>1</sup> "It is well settled, both in England and in this country, that judgments in cross-actions may be set off, the one against the other, when the parties in interest are the same, on motion addressed to the court in which one or both of the actions is pending. If the amounts are equal, both will be satisfied. If the amounts are unequal, the smaller will be satisfied in full, and the larger to the extent of the smaller, and an execution will issue for the balance."<sup>2</sup> The party seeking the benefit of a set-off should make his motion therefor in the court in which the judgment against him was recovered.<sup>3</sup> The right of set-off cannot be destroyed by a fraudulent assignment;<sup>4</sup> nor even by an assignment made in good faith after both judgments had been rendered, and the right to set-off had therefore accrued prior to the assignment.<sup>5</sup> Generally, a party will not be allowed to set off a judgment in his favor against a judgment against him, unless he is both the legal and equitable owner of the judgment in his favor, and the party against whom he seeks to exercise the right is also the beneficial owner of the judgment recovered by him.<sup>6</sup> In some instances the right of set-off exists though the parties are not in all respects the same. Thus a judgment in favor

<sup>1</sup> *Simson v. Hart*, 14 Johns. 63; *Brown v. Hendrickson*, 39 N. J. L. 239; *Tolbert v. Harrison*, 1 Bail. 599; *Connable v. Buckland*, 2 Aiken, 221; *Burns v. Thornburgh*, 3 Watts, 78; *Temple v. Scott*, 3 Minn. 419; *Low v. Duncan*, 3 Strob. 195; *Meador v. Rhyme*, 11 Rich. 631; *Colquitt v. Bonner*, 2 Ga. 155; *Makepeace v. Coates*, 8 Mass. 451; *Davidson v. Geoghagan*, 3 Bibb, 233; *Chipman v. Towle*, 130 Mass. 352; *Taylor v. Williams*, 14 Wis. 155.

<sup>2</sup> *Pierce v. Bent*, 69 Me. 385.

<sup>3</sup> *Cooke v. Smith*, 7 Hill, 186.

<sup>4</sup> *Hurst v. Sheets*, 14 Iowa, 322; *Russell v. Conway*, 11 Cal. 93; *Morris v. Hollis*, 2 Harr. (Del.) 4; *Makepeace v. Coates*, 8 Mass. 451.

<sup>5</sup> *Pierce v. Bent*, 69 Me. 381; *Porter v. Liscomb*, 22 Cal. 430; 83 Am. Dec. 76; *People v. N. Y. Common Pleas*, 13 Wend. 649; 28 Am. Dec. 495; *Puett v. Beard*, 86 Ind. 172; 44 Am. Rep. 280.

<sup>6</sup> *Mason v. Knowlton*, 1 Hill, 218; *Turner v. Satterlee*, 7 Cow. 480; *Lee v. Lee*, 31 Ga. 26; 76 Am. Dec. 681; *Meador v. Rhyme*, 11 Rich. 631.

of A, and against B and C, may be set off against one in favor of B and against A,<sup>1</sup> and a judgment in favor of a "principal alone may be applied in satisfaction of one against him and his sureties."<sup>2</sup> But, ordinarily, the rules respecting the mutuality of the parties are the same as when set-off is sought of demands not reduced to judgment.<sup>3</sup> A demand upon which judgment has not been recovered cannot be set off against a judgment.<sup>4</sup> A judgment founded upon contract may be set off against a judgment for damages suffered from a tort.<sup>5</sup>

#### PART II.—OF THE RIGHT OF THE PAYOR TO SUBROGATION.

§ 468. **Payment by a Stranger.**—No doubt one who is not a party to a judgment may advance money sufficient to pay it without producing its satisfaction, provided he does not at the time intend to satisfy it, and takes an assignment of it, or enters into an agreement that it is to be kept alive for his benefit.<sup>6</sup> Payment of a judgment by a third person will operate as an extinguishment or not, according to the intention of the parties when the payment is made. If the parties intend still to keep the judgment on foot, they may do so, proceeding in the name of the plaintiff.<sup>7</sup> But a third person making an absolute payment, in the absence of any previous understanding with the creditor that the judgment is to be kept alive, produces an irrevocable satisfaction, which cannot be avoided by a subsequent agreement that the judgment shall be enforced for his indemnity;<sup>8</sup> nor is he equitably entitled to be subrogated to the rights of the judgment

<sup>1</sup> *Simson v. Hart*, 14 Johns. 63; *Wright v. Cobleigh*, 23 N. H. 32; *Allen v. Hall*, 5 Met. 263.

<sup>2</sup> *Pierce v. Bent*, 69 Me. 386.

<sup>3</sup> *Atkins v. Churchill*, 19 Conn. 394; *Holmes v. Robinson*, 4 Ohio, 90; *Prince v. Fuller*, 34 Me. 122; *Ballinger v. Tarbell*, 16 Iowa, 491; 85 Am. Dec. 527; *Corwin v. Ward*, 35 Cal. 195; 95 Am. Dec. 93.

<sup>4</sup> *Thorpe v. Wegefarth*, 56 Pa. St. 82; 93 Am. Dec. 789; *Turner v. McAdory*, 56 Miss. 27.

<sup>5</sup> *Puett v. Beard*, 86 Ind. 172; 44 Am. Rep. 280.

<sup>6</sup> *Sydam v. Cannon*, 1 Houst. 431; *Marshall v. Moore*, 36 Ill. 321; *Owensby v. Platt*, 3 Ind. 459; *Shaw v. Clark*, 6 Vt. 507; 27 Am. Dec. 578.

<sup>7</sup> *Null v. Moore*, 10 Ired. 324.

<sup>8</sup> *St. Francis Mill Co. v. Sugg*, 83 Mo. 476; *Phillips v. Behn*, 19 Ga. 298; *Rogers v. Welte*, 61 Mich. 258; *Stevens v. Morse*, 7 Greenl. 36; 20 Am. Dec. 337; *Morris v. Lake*, 9 Smedes & M. 521; 48 Am. Dec. 724; *Terry v. O'Neal*, 71 Tex. 592.

creditor. "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases, the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."<sup>1</sup>

Though a stranger to a judgment who advances money sufficient to pay it agrees with the judgment creditor that it shall be kept alive, and takes an assignment thereof, he will be treated as having satisfied the judgment, if it was his duty to do so, or if his object was to prevent the sale of lands which he had purchased from the judgment debtor, subject to the lien of the judgment and sufficient in value to satisfy it, and to collect it out of lands previously sold by the debtor, and which in equity are not liable to sale until the lands of the payor have first been sold. As against the lands first sold, the payor cannot enforce the judgment, though he took an assignment thereof.<sup>2</sup>

§ 469. **Payment by Officer.**—An officer to whom an execution had been given neglected to levy thereunder in due time. He then paid the judgment voluntarily, without taking any assignment, and returned the execution as unsatisfied. He afterwards procured the issuing of an *alias* for his own benefit; but the court held that by his payment he had, under the circumstances, produced an absolute and irrevocable satisfaction of the judgment.<sup>3</sup> Generally, whenever an officer holding an execution against a defendant voluntarily pays the amount thereof

<sup>1</sup> Sandford v. McLean, 3 Paige, 117; <sup>2</sup> Lints v. Thompson, 1 Head, 456; 23 Am. Dec. 773; Head v. Gervais, 73 Am. Dec. 182; Arnett v. Cloud, 2 Walk. (Miss.) 431; 12 Am. Dec. 577. Ga. 53; Garth v. Campbell, 10 Mo.

<sup>3</sup> Merritt v. Richey, 97 Ind. 236. 154.

to the creditor, a satisfaction of the judgment results, and prevents the officer from enforcing the judgment for his indemnity.' An officer by his negligence may become answerable to a judgment creditor for the amount of an execution, and may be compelled to pay such amount. The question then arises whether his compulsory payment necessarily satisfies the original judgment, and precludes him from taking an assignment thereof and enforcing it against the judgment creditor. The courts of the state of New York deny that any distinction should be made between a voluntary and an involuntary payment by an officer who has become liable for his neglect in executing process. "No distinction," says the court, "has been taken between payments voluntarily made by the sheriff and those made upon compulsion, in consequence of a liability incurred by him, and there is no difference in principle. It cannot be material whether a sheriff voluntarily pays the amount of a claim of his own money, or by a voluntary breach of duty places himself in a position in which the payment can be enforced against him. An action is denied to him because such a practice would be not only against the rules of law, but would tend to multiply suits and increase litigation.<sup>1</sup> The right to enforce the execution for his own benefit has been denied him from principles of policy and the grand inconvenience which would ensue."

It will be seen from the decision from which this extract is made that in no case will a sheriff who has paid a sum sufficient to satisfy the plaintiff's demand be permitted, by taking an assignment, or otherwise, to keep alive a judgment which but for his own negligence he would have satisfied by levy and sale upon execution.<sup>2</sup> The grounds

<sup>1</sup> *Harwell v. Worham*, 2 *Humph.* 524; 37 *Am. Dec.* 572; *Whittier v. Hemingway*, 22 *Me.* 238; 38 *Am. Dec.* 309; *Clevinger v. Miller*, 27 *Gratt.* 740; *Reed v. Pruyn*, 7 *Johns.* 426; 5 *Am. Dec.* 287; *Feamster v. Withrow*, 12 *W. Va.* 611.

<sup>2</sup> *Jones v. Wilson*, 3 *Johns.* 434;

*Menderback v. Hopkins*, 8 *Johns.* 436; *Whittier v. Heminway*, 22 *Me.* 238; 38 *Am. Dec.* 309; *Beach v. Vandenberg*, 10 *Johns.* 361.

<sup>3</sup> *Bigelow v. Prevost*, 5 *Hill.* 566; *Boren v. McGehee*, 6 *Port.* 432; 31 *Am. Dec.* 695.



of this denial are based upon principles of public policy, and are thus clearly and convincingly stated in the same decision:—

“It is not so much a question of individual right as of public policy. It is fit and proper that the judgment debtor should be made to pay his debts, and it is the province and business of the sheriff to whom process is issued to compel him to do so by a proper, vigilant, and seasonable performance of his duty; but it is not discreet or consistent with just views of policy by any inducements to encourage a lax or careless discharge of the responsible duties devolved upon sheriffs. If an officer, intrusted with the execution of final process, may, without peril of ultimate loss, select his own time for its execution, he may seriously interfere with the rights of the creditor by delaying the process to his prejudice, and he may at his option employ the same process to annoy and oppress the debtor, and to make gain to himself. Both the debtor and creditor will be in a measure subject to the caprice of the sheriff, and serious inconveniences will result, if rights, either equitable or legal, are held to result to a sheriff from his own breach of duty.”<sup>1</sup>

While, no doubt, a sheriff who pays a judgment absolutely cannot afterwards use it to indemnify himself, we think the weight of authority and of reason in favor of the proposition that he may at any time purchase the judgment and take an assignment thereof, and thereafter enforce the judgment, especially if there is nothing oppressive or fraudulent in his conduct,<sup>2</sup> and perhaps even, where no assignment is made, the payment of the judgment recovered against the officer for damages resulting from his negligence is not necessarily a satisfac-

<sup>1</sup> *Carpenter v. Stilwell*, 11 N. Y. 61; *Am. Rep.* 489; *Allen v. Holden*, 9 *Sherman v. Boyce*, 15 Johns. 443. See *Mass.* 133; 6 *Am. Dec.* 46; *Dunn v. also Reed v. Pruyn*, 7 Johns. 426; 5 *Snell*, 15 *Mass.* 481; *Cheever v. Mir-*  
*Am. Dec.* 287. *rick*, 2 N. H. 376; *Rhea v. Preston*, 75

<sup>2</sup> *Heilig v. Lemly*, 74 N. C. 98; 21 *Va.* 757.

tion of the original judgment, precluding its subsequent enforcement for the officer's benefit.<sup>1</sup>

§ 470. **Payment by Surety.**—The law in relation to a surety who has paid a judgment against himself and his principal has been thus stated in North Carolina: "The right of a surety to keep alive a judgment, which he has paid, by having an assignment made to a stranger, for his benefit, is unquestionable. When he advances the money, he has a clear equity (if he desired it) to be subrogated to the rights of the creditor, and to use the creditor's judgment for the purpose of coercing payment against the principal. Whether money advanced in such a way be an extinguishment or a purchase seems to be a question of intention. If it be paid, and nothing be said or done to show a contrary intendment, an extinguishment will be presumed; but if an assignment be made to one not a party, so as to show a purpose to keep it alive, it is sufficient. That a party defendant furnishes the money, and that the assignment is made on a day subsequent to the advancement of the money, can make no difference, provided it was intended, at the time it was advanced, as a purchase, and not as a payment."<sup>2</sup>

No doubt the above language in no wise overestimates the rights of sureties. If they make an absolute payment of a judgment, an intention subsequently found to keep it alive will not prevent such payment from operating as a satisfaction;<sup>3</sup> but, on the other hand, they are of right entitled, if they so desire at the time of payment, to be subrogated to the rights and remedies of the judgment creditor, and therefore to demand and receive an assignment of the judgment.<sup>4</sup> The doctrine of subrogation is

<sup>1</sup> *Smith v. Alexander*, 4 Sneed, 482; 366; 30 Am. Dec. 172; *Brown v. Allen v. Holden*, 9 Mass. 133; 6 Am. White, 29 N. J. L. 514; 80 Am. Dec. 46, and note; *Chester v. Plaistow*, 43 N. H. 545.

<sup>2</sup> *Barringer v. Boyden*, 7 Jones, 187. See also *Dempsey v. Bush*, 18 Ohio St. 376.

<sup>3</sup> *Briley v. Sugg*, 1 Dev. & B. Eq.

<sup>4</sup> *Spray v. Rodman*, 43 Kan. 225; *Lyon v. Bolling*, 9 Ala. 463; 44 Am. Dec. 444; *Peters v. McWilliams*, 36 Ohio St. 155; *King v. Aughttry*, 3 Strob. Eq. 149.

recognized in its fullest extent in the civil law, under which "a surety paying the debt is subrogated to the rights of the creditor *ipso facto*."<sup>1</sup> "It is equally a settled principle in the *English chancery* that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor, and have his securities transferred to him, and to avail himself of those securities against the debtor. This right of the surety stands, not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution from another."<sup>2</sup> This right of a surety is operative against a grantee of the judgment debtor who has taken real estate subject to the lien of the judgment.<sup>3</sup> The entry of satisfaction on a judgment collected from a surety by execution, such entry not being made at the instance of the surety, is not a sufficient ground for refusing subrogation. Whether the fact of payment is or is not apparent from the record, has no influence on the rights of the parties.<sup>4</sup>

§ 471. **Payment by Indorser.** — "There can be no doubt that upon payment of a note or bill of exchange by a party thereto, who is not primarily liable for its payment, he becomes entitled to the possession of the bill or note, and may maintain an action upon it against any or all the prior parties thereto who have been properly charged; and if the contract of the party liable is merged in a judgment, the right of the person paying is to the judgment, as, but for the merger, it would have been to the bill or note. The payment by an indorser does not extinguish the liability of the maker or acceptor, and the indorser may take an assignment of any judgment which may

<sup>1</sup> *Sandford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773.

<sup>2</sup> *Hayes v. Ward*, 4 Johns. Ch. 123; 8 Am. Dec. 554.

<sup>3</sup> *McClung v. Beirne*, 10 Leigh, 394; 34 Am. Dec. 739. See also *Cottrell's Appeal*, 23 Pa. St. 294.

<sup>4</sup> *Baily v. Brownfield*, 20 Pa. St. 41. For further consideration of the rights of a surety who has paid a judgment, see *Fleming v. Beaver*, 2 Rawls, 128; 19 Am. Dec. 622, and note.

be recovered by the holder, and enforce it for his own benefit."<sup>1</sup>

§ 472. **Payment by One of Several Jointly Bound.** — Whether one of the several persons against whom a joint judgment has been recovered may pay the judgment and still keep it on foot, *by any means, or for any purpose*, is a question upon which the authorities are very equally divided. In an early case in New York a decree was entered against several, without designating the sum to be paid by each. One of the defendants paid the full amount of the decree, at the same time stipulating with plaintiff's solicitor for the right to reimburse himself. An execution having issued at the instance of the defendant who had paid, it was at first stayed; but upon petition for vacation of this stay the chancellor said: "The defendant who had paid more than his due proportion, or who had paid the whole, when the same ought to be borne by the co-defendants, or some of them, was entitled to stand in the place of the plaintiff, and to use the decree for his protection and indemnity, so far as it clearly and certainly appeared that the other defendants ought to contribute."<sup>2</sup> In this case the defendants were not jointly bound on any obligation made by them anterior to the decree. They were the administrators of the mortgagee and assignees under him. Upon a bill filed against them by the mortgagor, they were required by the decree to pay a sum named for rents and profits; but the decree did not designate the sum to be paid by each. One of them paid the entire decree, to prevent "an impending execution." This decision, therefore, because the case of which it disposed differed in these material circumstances from ordinary cases resulting in a joint judgment, can hardly be considered as authority on either side of the question. At all events, the recent decisions in the same state are in opposition to the general

<sup>1</sup> *Eno v. Crooka*, 10 N. Y. 66; *Corey v. White*, 3 Barb. 12.

<sup>2</sup> *Scribner v. Hickok*, 4 Johns. Ch. 530.

tenor of the chancellor's remarks in *Scribner v. Hickok*. In the most recent case in New York treating on this subject, *Selden, J.*, in pronouncing the unanimous judgment of the court of appeals, said: "The general principles upon which this case depends are simple and plain. Where one of several defendants against whom there is a joint judgment pays to the other party the entire sum due, the judgment becomes thereby extinguished, whatever may be the intention of the parties to the transaction. It is not in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment. If, therefore, in such a case, a defendant take an assignment to himself, or, unless under special circumstances, even to a third person for his own benefit, the assignment is void and the judgment satisfied."<sup>1</sup> The rule as laid down in New York seems to be recognized in Massachusetts,<sup>2</sup> Indiana, and Vermont,<sup>3</sup> and is distinctly affirmed and applied in Alabama and North Carolina, where the joint defendants are co-sureties.<sup>4</sup> On the other hand, the right of any defendant to furnish money to pay the whole judgment, and, by taking an assignment to a third person, to employ the judgment as a means of enforcing contribution from his co-defendants, is distinctly and confidently affirmed. The right to subrogation in such cases is said to depend only on the intention of the debtor in making the payment.<sup>5</sup> "To construe that as a payment which was meant to be an assignment is a contraction of terms."<sup>6</sup> Whether a co-defendant has the right,

<sup>1</sup> *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Mathews v. Lawrence*, 1 Denio, 212; 43 Am. Dec. 665; followed in *Booth v. F. & M. N. Bank*, 74 N. Y. 228.

<sup>2</sup> *Hammatt v. Wyman*, 9 Mass. 138.

<sup>3</sup> *Klippel v. Shields*, 90 Ind. 81; *Porter v. Gale*, 44 Vt. 520; *Allen v. Ogden*, 12 Vt. 9.

<sup>4</sup> *Preslar v. Stallworth*, 37 Ala. 405; *Towe v. Felton*, 7 Jones, 216; *Hinton*

*v. Odenheimer*, 4 Jones Eq. 406; *Sherwood v. Collier*, 3 Dev. 330; 24 Am. Dec. 284.

<sup>5</sup> *Coffee v. Tevis*, 17 Cal. 239; *Wheeler's Estate*, 1 Md. Ch. 80; *Brown v. White*, 29 N. J. L. 514; 80 Am. Dec. 226; reversing *White v. Brown*, 29 N. J. L. 307; *Durand v. Trusdell*, 44 N. J. L. 597; *Huckaby v. Sasser*, 69 Ga. 603, by statute.

<sup>6</sup> *McIntyre v. Miller*, 13 Mees. & W. 728.

on paying a judgment, to take an assignment for his benefit or not, his payment without such assignment, and without any agreement that the judgment shall be kept alive for the purpose of enabling him to compel contribution from his co-defendants, is a complete and irrevocable satisfaction.<sup>1</sup>

§ 473. **Payment by Co-defendant and a Third Person.**—J. V., being defendant in a judgment of which, as between him and his co-defendants, he was liable for one seventh, paid the judgment by giving the plaintiff one seventh in money, and a note indorsed by C. V. for the remaining six sevenths. An assignment of the judgment was, at the same time, made to J. V.'s attorney, to be held by him to indemnify C. V. for his liability as indorser of the note. C. V., having been obliged to pay the note, the question arose whether he was entitled to enforce the judgment by execution. The court held that if the payment of the judgment had been made by J. V. and C. V. jointly, and an assignment taken in the name of a third person, such assignment, so far as intended to protect J. V., would be void, but as to C. V. would be valid; that although C. V. did not pay money, he became contingently liable to pay it, "and an assignment of the judgment to protect him against this liability was just as legitimate and proper as it would have been to indemnify him for money paid"; and further, that as the law always presumed a lawful rather than an unlawful intent, it must be presumed, in the absence of evidence to the contrary, that the assignment was taken for the lawful purpose of protecting C. V.<sup>2</sup>

#### PART III.—BY PROCEEDINGS UNDER EXECUTION.

§ 474. **Levy on Lands.**—A return of "lands delivered," on an *elegit*, is a legal satisfaction of the judgment,<sup>3</sup> though the debtor's interest in the land and its income is set off

<sup>1</sup> *Tompkins v. Fifth N. B.*, 53 Ill. 87; *Bones v. Aiken*, 35 Iowa, 534; *Sager v. May*, 15 R. I. 528.

<sup>2</sup> *Harbeck v. Vanderbilt*, 20 N. Y. 395.  
<sup>3</sup> *Hinesly v. Hunn's Adm'r*, 5 Harr. (Del.) 236.

to the creditor at a yearly value to continue for a term of years, should the debtor so long live, and he, having only a life estate, die before the expiration of the term of years.<sup>1</sup> But the nature of the proceedings, by levy and sale under execution, is entirely different from that which formerly resulted in setting off to the creditor sufficient lands of the debtor to discharge the debt. By a levy of land under execution the creditor acquires no property in the land, absolute or conditional. Such levy, unless consummated by a sale (and then only to the extent of the proceeds realized), is no satisfaction of the judgment,<sup>2</sup> except in Indiana;<sup>3</sup> and an action may be prosecuted on such judgment while the levy is still subsisting.<sup>4</sup> But it is said that the court will so control its process as to prevent the plaintiff from harassing defendant and putting him to unnecessary cost by abandoning a levy on land and proceeding to make a new levy on other property.<sup>5</sup>

§ 475. **Levy on Personal Property.**—Levy upon personal property sufficient in value to satisfy the execution is frequently said to operate *per se* as an extinguishment of the judgment.<sup>6</sup> In regard to the effect of such a levy,

<sup>1</sup> Thomas v. Platts, 43 N. H. 629; Pratt v. Jones, 22 Vt. 341; 54 Am. Dec. 80; Blumfield's Case, 5 Rep. 87 a; Com. Dig., tit. Execution, H.

<sup>2</sup> Spafford v. Beach, 2 Doug. (Mich.) 150; White v. Graves, 15 Tex. 183; Hoard v. Wilcox, 47 Pa. St. 60; Robinson v. Brown, 82 Ill. 279; Townsend v. Smith, 20 Tex. 465; 70 Am. Dec. 400; Trapnall v. Richardson, 13 Ark. 543; 58 Am. Dec. 338; Reynolds v. Rogers, 5 Ohio, 169; Gold v. Johnson, 59 Ill. 62; Hammond v. Myrick, 14 Ga. 77; Boyd v. Mann, 9 Bart. 349; Overby v. Hart, 68 Ga. 493; Peale v. Bolton, 24 Miss. 630. It has even been held that money in a sheriff's hands realized from a sale of realty under execution is not *per se* a satisfaction of the judgment: Bank of Pennsylvania v. Winger, 1 Rawle, 295; 18 Am. Dec. 633.

<sup>3</sup> Neff v. Hagaman, 78 Ind. 57; Lindsey v. Kelly, 42 Ind. 294. See also Hopkins v. Chambers, 7 B. Mon. 257.

<sup>4</sup> Deloach v. Myrick, 6 Ga. 410; Reynolds v. Ex'rs of Rogers, 5 Ohio, 169; Patterson v. Swan, 9 Serg. & R. 16; Beasley v. Prentiss, 13 Smedes & M. 97; Shepard v. Rowe, 14 Wend. 280; Taylor v. Ranney, 4 Hill, 619; Ladd v. Blunt, 4 Mass. 402.

<sup>5</sup> Trapnall v. Richardson, 13 Ark. 543; 58 Am. Dec. 338.

<sup>6</sup> Ex parte Lawrence, 4 Cow. 417; 15 Am. Dec. 386; Wood v. Torrey, 6 Wend. 562; Carr v. Weld, 19 N. J. Eq. 319; Hoyt v. Hudson, 12 Johns. 207; Troup v. Wood, 4 Johns. Ch. 228; People v. Chisholm, 8 Cal. 29; Hunt v. Breeding, 12 Serg. & R. 37; 14 Am. Dec. 665; Reed v. Crosthwait, 6 Iowa, 219; 71 Am. Dec. 406; Campbell v. Spence, 4 Ala. 543; 39 Am. Dec. 301; Trigg v. Harris, 49 Mo. 176; Frank v. Braskett, 44 Ind. 92; Martin v. Carter, 27 Ill. 294; Webb v. Bumpass, 9 Port. 201; 33 Am. Dec. 310.

there is no substantial conflict of opinion, though judges have differed somewhat in describing this effect and the means by which it is produced. None of the decisions assumes that a levy produces any absolute satisfaction.<sup>1</sup> It is a satisfaction *sub modo*; the levy must be fairly exhausted before further proceedings can be taken, and while these proceedings are going on the plaintiff cannot have another execution, nor sue on the judgment, nor redeem lands under it.<sup>2</sup> After the levy, if the sheriff wastes the property, or it is lost through his neglect or that of the plaintiff, the satisfaction is absolute.<sup>3</sup> If, without any fault of the plaintiff or of the sheriff, the levy does not produce proceeds sufficient to satisfy the execution, then the plaintiff is entitled to proceed for so much as remains unpaid, as if no levy had been made.<sup>4</sup> If, after levy upon sufficient personal property, the court orders that the judgment be not enforced, the order releases the levy, but does not discharge the judgment.<sup>5</sup> Where the property is never taken from the possession of the defendant,<sup>6</sup> or where, after being so taken, it is restored to him at his request, or by some act for which he is responsible, or in which he acquiesces, the levy does not operate as a satisfaction, so far at least as his rights are concerned.<sup>7</sup> When

<sup>1</sup> *Shelton v. Hamilton*, 23 Miss. 496; 57 Am. Dec. 149; *French v. Snyder*, 30 Ill. 343; 83 Am. Dec. 193; *In re King*, 2 Dev. 341; 21 Am. Dec. 335; *Walker v. McDowell*, 4 Smedes & M. 118; 43 Am. Dec. 476; *Hyde v. Rogers*, 59 Wis. 154.

<sup>2</sup> *First National Bank v. Rogers*, 13 Minn. 407; 97 Am. Dec. 239; *Mountney v. Andrews*, Cro. Eliz. 237; *Green v. Burke*, 23 Wend. 501; *McIntosh v. Chew*, 1 Blackf. 289; *Bank v. Rogers*, 15 Minn. 381; *Maxwell v. Stewart*, 22 Wall. 77.

<sup>3</sup> *Pickens v. Marlow*, 2 Smedes & M. 428; *Ladd v. Blunt*, 4 Mass. 402; *Peck v. Tiffany*, 2 N. Y. 451; *Trenary v. Cheever*, 48 Ill. 28; *Kershaw v. Merchants' Bank*, 7 How. (Miss.) 386; 40 Am. Dec. 70; *Hoard v. Wilcox*, 47 Pa. St. 51.

<sup>4</sup> *Barret v. Thompson*, 5 Ind. 457; *Banta v. McClennan*, 14 N. J. Eq. 120;

*Hoard v. Wilcox*, 47 Pa. St. 51; *Curtis v. Root*, 28 Ill. 367; *Mickles v. Haskin*, 11 Wend. 125; *Voorhees v. Gros*, 3 How. Pr. 262; *People v. Hopson*, 1 Denio, 574; *Summerhill v. Trapp*, 48 Ala. 368; *Bank of Tennessee v. Turney*, 7 Humph. 271.

<sup>5</sup> *Mulford v. Estudillo*, 32 Cal. 131.

<sup>6</sup> *Cravens v. Wilson*, 48 Tex. 324; *Rhea v. Preston*, 75 Va. 757; *Garner v. Cutler*, 28 Tex. 176.

<sup>7</sup> *United States v. Dashiell*, 3 Wall. 688; *Holbrook v. Champlin*, Hoff. Ch. 148; *Thomas's Ex'r v. Cleveland*, 33 Mo. 126; 82 Am. Dec. 155; *Smith v. Hughes*, 24 Ill. 270; *Cornelius v. Burford*, 28 Tex. 202; 91 Am. Dec. 309; *Cummin's Appeal*, 9 Watts & S. 73; 64 Am. Dec. 695; *Young v. Cleveland*, 33 Mo. 126; 82 Am. Dec. 155; *Freeman on Executions*, sec. 269; *Churchill v. Warren*, 2 N. H. 298; 9 Am. Dec. 73; *Sasscer v. Walker*, 4



third persons, as sureties, are collaterally liable, the release of the levy cannot revive the judgment as to them;<sup>1</sup> and in general, so far as the rights of third persons are concerned, the levy upon goods is a satisfaction of the judgment to the extent of their value, unless plaintiff is deprived of the benefit of his levy without any fault of his or of the officer levying the writ.<sup>2</sup> The presumption of satisfaction arising from the levy of an execution upon personalty may be rebutted by showing that the property was taken out of the hands of the officer levying the writ, through the execution of a sufficient undertaking on appeal,<sup>3</sup> or a forthcoming and delivery bond,<sup>4</sup> or by the property being taken from the officer under legal process authorizing such taking,<sup>5</sup> or lost by an accident for which the officer is not liable,<sup>6</sup> or sold under execution, and the proceeds applied to the satisfaction of prior liens.<sup>7</sup>

It is apparent that the satisfaction, if such it may be called, produced by a levy on personal property, is liable to be removed by a variety of circumstances. Therefore it is probable that the term "suspension" is more applicable to the effect of such a levy than the term "satisfaction." Thus Chief Justice Bronson, in *People v. Hopson*, 1 Denio, 574, said: "If the broad ground has not yet been taken, it is time it should be asserted that a mere levy on sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. So long

Gill & J. 102; 25 Am. Dec. 272; Biscoe v. Sandefur, 14 Ark. 568; Caudle v. Dars, 7 Ark. 46; Chandler v. Higgins, 109 Ill. 602; Horn v. Ross, 20 Ga. 210; 65 Am. Dec. 621.

<sup>1</sup> Mulford v. Estudillo, 23 Cal. 94; Howerton v. Sprague, 64 N. C. 451; Finley v. King, 1 Head, 123; La Farge v. Herter, 9 N. Y. 241.

<sup>2</sup> Lyon v. Hampton, 20 Pa. St. 46; Hunt v. Breeding, 12 Serg. & R. 37; 14 Am. Dec. 665, and note; Bank v. Fordyce, 9 Pa. St. 275; 49 Am. Dec. 561; Curran v. Colbert, 3 Ga. 239; 46 Am. Dec. 427; Commercial Bank v. W. R. Bank, 11 Ohio, 344; 38 Am. Dec. 739.

<sup>3</sup> Fry v. Manlove, 1 Baxt. 256; 25

Am. Rep. 775; Bennett v. Grada, 15 Minn. 132; First Nat. Bank v. Rogers, 13 Minn. 381; 97 Am. Dec. 239.

<sup>4</sup> Ambrose v. Root, 11 Ill. 488; 52 Am. Dec. 456; Parker v. Jones, 5 Jones Eq. 276; 75 Am. Dec. 441; Curtis v. Root, 28 Ill. 367.

<sup>5</sup> Alexander v. Polk, 39 Miss. 737; Banks v. Evans, 10 Smedes & M. 35; 48 Am. Dec. 734. But an unauthorized taking does not have this effect: State v. Rix, 80 Mo. 60.

<sup>6</sup> Starr v. Moore, 3 McLean, 354.

<sup>7</sup> Peay v. Fleming, 2 Hill Ch. 97; Newson v. McLendon, 6 Ga. 392; Cornelius v. Burford, 28 Tex. 202; 91 Am. Dec. 309.

as the property remains in legal custody the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain action on the judgment, nor use it for the purpose of becoming a redeeming creditor. The mere levy neither gives anything to the creditor nor takes anything from the debtor. It does not divest title. It only creates a lien on the property."<sup>1</sup> But the distinctions here taken show a difference in the choice of terms in which to convey the same idea, rather than any material difference of opinion. By whatever term we designate the result of a levy on personal property, and from whatever cause that result is thought to proceed, the result remains the same, and casts upon the party who has made such a levy, before he can proceed further, the *onus* of establishing that, from no fault of his or of the officers, or from some act or consent of the defendant, the levy has not proved productive of a complete satisfaction.<sup>2</sup> If the personal property of one of several defendants is levied upon, his co-defendants have no right to insist that it be held under execution, and cannot successfully claim that its surrender without their consent is a satisfaction of the judgment, and some of the decisions go so far as to state that a levy upon the property of one defendant cannot support a plea of satisfaction in favor of another.<sup>3</sup>

Personal property may have been levied upon under attachment and left in the possession of the sheriff or other officer levying the writ to secure the payment of such judgment as may be recovered in the action. Where execution issues, it is the duty of such officer to apply towards its satisfaction the property so attached and left in his hands; but he may have embezzled or otherwise misappropriated it, or allowed it to be lost by his negli-

<sup>1</sup> See also, to same effect, *Whiting v. Beebe*, 12 Ark. 421. 490; *Binford v. Alston*, 4 Dev. 351; *Churchill v. Warren*, 2 N. H. 298; 9

<sup>2</sup> *Barret v. Thompson*, 5 Ind. 457; *Am. Dec.* 73; *Walker v. Bradley*, 2 Ark. 578.

<sup>3</sup> *McGinnis v. Lillard's Ex'r*, 4 Bibb,

gence. When such is the case, we think the better opinion is, that it must, as between plaintiff and defendant, and persons claiming under defendant, be treated as though it had been levied upon under execution as well as under attachment, and therefore as satisfying the judgment to the extent of its value.<sup>1</sup>

### § 476. Discharge of a Defendant Taken in Execution.

— Taking the defendant in execution was, at the common law, regarded as a satisfaction of the judgment, at least so far that no other writs could properly be issued or executed while he remained in custody, nor after he had been released therefrom by the act or consent of the plaintiff.<sup>2</sup> If a defendant taken in execution regained his liberty, no further proceedings could be taken for the same debt, unless he had escaped without the consent of the creditor, or had procured such consent through fraud.<sup>3</sup> The debtor, after his discharge by consent, could not lawfully be retaken, though he procured this consent by giving a new security, which was defeated on account of an informality;<sup>4</sup> or agreed that the judgment should be revived, or that he would pay the debt at a future day;<sup>5</sup> or that the judgment should continue in force as security, and should be enforced by execution if not paid.<sup>6</sup> The rigor of the common law was relaxed in England, in the reigns of James I. and of William III., by statutes authorizing the arrest of defendant on a new execution, if his liberty had been gained by privilege of either house of Parliament, or by escape from prison

<sup>1</sup> *Yourt v. Hopkins*, 24 Ill. 326; *Kendrick v. Huff*, 71 Mo. 570.

<sup>2</sup> *Douglas v. Wallace*, 11 Ohio, 42; *Tanner v. Hague*, 7 Term Rep. 420; *Lambert v. Farnell*, 15 L. J. Q. B. 55; 10 Jur. 31; *Dodge v. Doane*, 3 Cush. 460; *Coburn v. Palmer*, 10 Cush. 273; *Stover v. Duren*, 3 Strob. 468; 51 Am. Dec. 634; *Freeman on Executions*, sec. 462; *Koenig v. Steckel*, 58 N. Y. 475.

<sup>3</sup> *Vigers v. Aldrich*, 4 Burr. 2483; *King v. Goodwin*, 16 Mass. 63; *State*

*v. Richardson*, 18 Ala. 109; *Jaques v. Withy*, 1 Term Rep. 557; *Porter v. Ingraham*, 10 Mass. 88; *Cattlin v. Kernott*, 3 Com. B., N. S., 796; *Lambert v. Farnell*, 15 L. J. Q. B. 55; 10 Jur. 31.

<sup>4</sup> *Jaques v. Withy*, 1 Term Rep. 552; *Clark v. Clement*, 6 Term Rep. 525.

<sup>5</sup> *Thompson v. Bristow*, Barnes, 205; *Tanner v. Hague*, 7 Term Rep. 420.

<sup>6</sup> *Blackburn v. Stupart*, 2 East, 243; *Coburn v. Palmer*, 10 Cush. 273.

"by any ways or means howsoever," and also authorizing the creditor to sue out a new execution against the property of a debtor dying in prison.<sup>1</sup> These statutes are supposed to be part of the common law of Massachusetts;<sup>2</sup> and if so, they must be equally applicable to the other English colonies in this country. Both in this country and in England, several exceptions seem to be recognized, in addition to those provided by these statutes or existing at the earlier periods of the common law. A discharge from custody because plaintiff refuses to pay the prison fees is now no satisfaction of the judgment.<sup>3</sup> Neither is a satisfaction produced by a discharge of the debtor from custody under laws for the benefit of insolvent debtors. The plaintiff may, notwithstanding such discharge, proceed to enforce his lien on lands of the debtor, though they have been conveyed to third persons pending the imprisonment.<sup>4</sup> In Massachusetts, the discharge of a debtor, by virtue of a void recognizance, is not regarded as a discharge by consent, but as an escape, and the judgment, therefore, is not released in consequence of the arrest and liberation.<sup>5</sup> The imprisonment of a debtor for a fine is not a discharge thereof. Therefore his release from imprisonment by the people or by the king does not discharge the fine.<sup>6</sup>

§ 477. *Suspension while in Custody.*—The taking of the defendant in execution, like the levy upon sufficient goods, operates as a suspension of the judgment for the time being.<sup>7</sup> But if there are two or more defendants, the taking of one of them in execution does not suspend the plaintiff's right to take the others. He may proceed

<sup>1</sup> *Stata. Jac. I.*, c. 13; 21 *Jac. I.*, c. 578; *Strode v. Broadwell*, 36 *Ill.* 24; 8 & 9 *Wm. III.*, c. 27. 419.

<sup>2</sup> *Coburn v. Palmer*, 10 *Cush.* 273.

<sup>3</sup> *Prentiss v. Hinton*, 6 *Blackf.* 35; <sup>4</sup> *Brown v. Kendall*, 8 *Allen*, 209.  
*Hidden v. Saunders*, 2 *R. I.* 391; *Stor-* <sup>5</sup> *State v. Richardson*, 18 *Ala.* 109;  
*ver v. Duren*, 3 *Strob.* 448; 51 *Am.* *Rex v. Woolf*, 1 *Chit.* 401; *Rex v.*  
*Dec.* 634; *Nardin v. Battie*, 3 *East*, 87; *Wade, Skin.* 12; *The King v. Woolf*,  
5 *East*, 147. 2 *Barn. & Ald.* 609.

<sup>6</sup> *Owen v. Glover*, 2 *Cranch C. C.* 305; *Bank v. Beale*, 7 *Bosw.* 611.  
<sup>7</sup> *Fassett v. Tallmadge*, 15 *Abb. Pa.*

to arrest the defendants successively, and if a return of *non est inventus* is made as to one, the plaintiff may proceed against his bail, though the other defendants are in custody.<sup>1</sup> All other means of enforcing the judgment are suspended. No action can be maintained on it while any of the defendants are in custody; because such action must be joint, and the judgment, being for the present, at least, discharged as to the one in prison, cannot constitute a joint cause of action.<sup>2</sup> But the discharge of one defendant from custody with the consent of the plaintiff, being a satisfaction of the judgment, operates as such in favor of his co-defendants.<sup>3</sup> If several actions are prosecuted to judgment against persons engaged in committing the same act of trespass, the discharge by plaintiff of the defendant in either judgment satisfies all the judgments. "The plaintiff in the judgment was entitled to but one satisfaction for the injury which he had sustained by the trespass committed by the defendants in the judgments, and that he has had by the imprisonment of one defendant and his discharge therefrom."<sup>4</sup> An attorney at law, having no authority as such to satisfy a judgment without full payment, cannot authorize the discharge of a defendant taken in execution.<sup>5</sup>

In Massachusetts and New Hampshire, the discharge of the defendant from custody is not in any event a satisfaction of the judgment.<sup>6</sup> In South Carolina, a judgment creditor may release his creditor temporarily without losing the right to reimprison him,<sup>7</sup> while in Maryland the release of a defendant with his assent revives the judgment.<sup>8</sup>

<sup>1</sup> Penn. v. Remsen, 24 How. Pr. 503; Chapman v. Hatt, 11 Wend. 41; Raymond v. Butterworth, 139 Mass. 471; Blomefield v. Wythe, Moore K. B. 459.

<sup>2</sup> Chapman v. Hatt, 11 Wend. 41; Clark v. Clement, 6 Term Rep. 525; Kasson v. People, 44 Barb. 347.

<sup>3</sup> Whiting v. Beebe, 13 Ark. 421; Lovejoy v. Murray, 3 Wall. 1; Clark v. Clement, 6 Term Rep. 525; Ransom v. Keyes, 9 Cow. 128; Heeles v. Frazer, 7 Scott N. R. 469.

<sup>4</sup> Kasson v. People, 44 Barb. 347.

<sup>5</sup> Jackson v. Bartlett, 8 Johns. 361; Kellogg v. Gilbert, 10 Johns. 220; 6 Am. Dec. 335; Simonton v. Barrell, 21 Wend. 362.

<sup>6</sup> Abbott v. Osgood, 38 N. H. 280; Cheney v. Whiteley, 9 Cush. 289; Raymond v. Butterworth, 139 Mass. 471.

<sup>7</sup> Eggart v. Barnstine, 4 McCord, 162.

<sup>8</sup> Lawson v. Snyder, 1 Md. 71.

§ 478. **By Sale under Execution.**—A mere sale of property under execution is not, until the payment of the amount bid, a satisfaction of the judgment.<sup>1</sup> But there are many instances in which property is sold, and the bid either paid or the amount thereof credited on the writ, and in which the purchaser obtains no title. In these cases the question arises whether the judgment is satisfied by the void sale, so that there can be no further execution against defendant, though neither he nor his property has contributed to the payment of the judgment. In some states a sale of property under execution, until vacated or set aside, is, to the extent of the sum realized, an absolute, irrevocable satisfaction of the judgment; and if the law provides that in case the purchaser's title, through any defect, fails he may have an action against the defendant in execution, the rule is the same. The judgment cannot be revived. The purchaser must pursue the remedy given by the statute. He cannot proceed by action on the judgment.<sup>2</sup> If the plaintiff proceeds under a valid judgment, but upon void process, and thereby produces a satisfaction of his judgment, he may, on account of the void character of the process, be compelled to restore to the defendant the property taken under the execution, or to account for the proceeds thereof. In such case it is evident that the satisfaction of the judgment has been produced without any gain to the plaintiff, or any loss to the defendant. The former may therefore, on motion made to the court wherein the judgment was rendered, have the satisfaction set aside and be allowed a new and regular execution with which to enforce his judgment.<sup>3</sup>

<sup>1</sup> *Chapman v. Harwood*, 8 Blackf. 82; 41 Am. Dec. 736.

<sup>2</sup> *Halcombe v. Loudermilk*, 3 Jones, 491; *Wall v. Fairley*, 77 N. C. 105.

<sup>3</sup> *Hughes v. Streeter*, 24 Ill. 647; 76 Am. Dec. 777; *Watson v. Reissig*, 24 Ill. 281; 76 Am. Dec. 746; *Kercheval v. Lamar*, 68 Ind. 442; *Stoyel v. Cady*, 4 Day, 225; *Arnold v. Fuller*, 1 Ohio, 486; *Smith v. Reed*, 52 Cal. 345. The rule mentioned in the text seems to

extend to all cases where the defendant had title, and through some irregularity in the proceedings it was not divested. He cannot retain the thing sold, nor require plaintiff to account to him for it, and at the same time insist on the satisfaction of the judgment: *Townsend v. Smith*, 20 Tex. 465; 70 Am. Dec. 400; *Tate v. Anderson*, 9 Mass. 92; *Gooch v. Atkins*, 14 Mass. 379; *Ladd v. Blunt*, 4 Mass. 402.

But the execution, judgment, and sale may all be perfectly regular, but the defendant may have no interest whatever in the property sold. In such case if the plaintiff is the purchaser, a satisfaction is also produced without any resulting benefit to the plaintiff, or any detriment to the defendant. The question then arises, Is this satisfaction irrevocable? or may the plaintiff have it vacated, and procure a new execution? Upon this question the authorities are quite evenly divided and are clearly irreconcilable. On the one hand, it is insisted that as "the maxim *caveat emptor* applies to all purchasers at sheriffs' sales," the purchaser takes all risks, and therefore that he cannot have the sale and the satisfaction thereby produced vacated on account of the failure of the defendant's title.<sup>1</sup> On the contrary, it is claimed that "the doctrine of *caveat emptor* has its legitimate force in precluding any idea of warranty by the defendant in execution, or by the sheriff," and therefore that it interposes no obstacle to prevent the plaintiff from obtaining that relief to which, "upon principles of natural justice, he seems entitled."<sup>2</sup> The cases, as we have shown, are of two classes; the first class comprising cases where the purchaser fails to obtain title owing to some irregularity in the execution or the proceedings thereunder, and the second class including all those cases where the failure of title results from the fact that the defendant had no title to be transferred. Independent of statutory provisions, it seems to be clear that the purchasing creditor is entitled to relief in cases of the first class; while of cases of the second class, nothing can be said except that the authorities are inconsistent and quite

<sup>1</sup> Vattier v. Lytle's Ex'r, 6 Ohio, 482; Freeman v. Caldwell, 10 Watts, 10; Salmond v. Price, 13 Ohio, 383; Hollister v. Dillon, 4 Ohio St. 206; Lansing v. Quackenbush, 5 Cow. 38; Jones v. Burr, 5 Strob. 147; 53 Am. Dec. 699.

<sup>2</sup> Ritter v. Henshaw, 7 Iowa, 98; Tudor v. Taylor, 26 Vt. 444; Adams v. Smith, 5 Cow. 280; Maguire v. Marks, 28 Mo 193; 75 Am. Dec. 121; Whiting

v. Bradley, 2 N. H. 99; Townsend v. Smith, 20 Tex. 465; 70 Am. Dec. 400; Cowles v. Bacon, 21 Conn. 451; 56 Am. Dec. 371; Chambers v. Cochran, 18 Iowa, 159. But even in these states the sale will not be set aside if the defendant has some interest in the property, as when he has the legal title subject to certain liens: Holtzinger v. Edwards, 51 Iowa, 383.

evenly balanced, with perhaps a slight preponderance also in favor of granting relief. In California, the Code of Civil Procedure provides that "if the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice, and on motion of such party in interest, revive the original judgment."<sup>1</sup> This statute clearly provided for all cases which we have referred to as of the first class; and it has been adjudged to extend over cases of the second class also. In the case of *Cross v. Zane*,<sup>2</sup> the plaintiff took out execution, and levied it upon lands in which defendant had no interest, and became the purchaser at the sale. On ascertaining that defendant had no interest in the property, plaintiff petitioned the court to set aside the sale and revive the judgment. The supreme court, reversing the judgment of the district court, which had denied the petition, said: "If the controversy here were to be determined by the application of the general principles of law, there would certainly be found to be an irreconcilable conflict between the adjudicated cases upon the point. But as we construe the statute, the case is covered by the provision that the original judgment may be revived '*when the property sold was not subject to execution and sale.*' The statute, being remedial in its character, is to receive a liberal construction, and we think that where, as here, the property sold was not the property of the defendant in execution, but wholly that of a stranger, it amounted to a sale of property *not subject to execution and sale*, within the intent of the act."

§ 478 a. **Vacation of Satisfaction.** — Whether, on a purchase of lands to which defendant had no title, the plain-

<sup>1</sup> See Code Civ. Proc., sec. 708. A similar statute exists in Tennessee: *Edde v. Cowan*, 1 Sneed, 295. <sup>2</sup> *Cross v. Zane*, 47 Cal. 602; *Scherr v. Himmelman*, 53 Cal. 312.



But the execution, judgment, and sale or not, it seems regular, but the defendant may have been relieved in the property sold. In such case a denied at law on purchaser, a satisfaction is also or forum is a court of resulting benefit to the plaintiff, in a variety of forms, defendant. The question then the record to be satisfied, irrevocable? or may the plaintiff was induced by fraud, mis- cure a new execution? Under cause, not producing an ities are quite evenly divided including the plaintiff from pur- On the one hand, it is held to reinstate his judgment. In emptor applies to all parties may proceed by *scire facias* or by chaser takes all risks original judgment.<sup>3</sup> But the remedy the sale and the satisfaction is by motion in the original action account of the fact concerning the entry or return of satisfaction contrary, it is held execution to issue for so much of the judg- has its legitimate unpaid.<sup>4</sup> Thus a court may, on motion, by the defer acknowledgment of satisfaction on the ground therefore that it was entered by the mistake of the clerk<sup>5</sup> or of the plaintiff, or was procured by misrepresentation or other principles of law, or was entered by one only of the judgment credi- we have without authority of the others, and without receiv- ing credit, or payment in full,<sup>6</sup> or by an attorney or other person to so authorized to act.<sup>7</sup> In fact, an entry of satisfaction is ther a receipt, and, like a receipt, may be explained or wh avoided by satisfactory evidence that payment was not de in fact made;<sup>10</sup> or, though made, has become inoperative s' by reason of the reversal of a judgment, the vacating of a sale, or by any other cause rendering it inequitable for

<sup>3</sup> Warner v. Helm, 1 Gilm. 220;

Henry v. Keys, 5 Sneed, 489; Price

Boyd, 1 Dana, 436; Jones v. Henry,

<sup>4</sup> Litt. 428; Muir v. Craig, 3 Blackf.

<sup>5</sup> 25 Am. Dec. 111.

<sup>6</sup> Lansing v. Quackenbush, 5 Cow.

<sup>7</sup> Cowles v. Bacon, 21 Conn. 451; 56

Am. Dec. 371; Stewart v. Armel, 62

Ind. 593.

<sup>8</sup> Magwire v. Marks, 28 Mo. 193;

<sup>9</sup> 76 Am. Dec. 121; Sims v. Campbell, 1

McCord Eq. 53; 16 Am. Dec. 595;

Freeman on Executions, sec. 53.

<sup>10</sup> Waters v. Engle, 53 Md. 179.

<sup>11</sup> Cohen v. Camp, 46 Mo. 179; Shan-  
non v. Wollard, 12 Lea, 663.

<sup>12</sup> Chapman v. Blakeman, 31 Kan.

684; Wilson v. Stilwell, 14 Ohio St.

464; McGregor v. Comstock, 28 N.Y.

237; Ackerman v. Ackerman, 44 N.J.L.

173; Bogle v. Bloom, 36 Kan. 512;

Christian v. Clark, 10 Lea, 630; Voell

v. Kelly, 64 Wis. 504.

<sup>13</sup> Haggin v. Clark, 61 Cal. 1.

<sup>14</sup> Turnan v. Temke, 84 Ill. 286.

<sup>15</sup> Dane v. Holmes, 41 Mich. 661;

Stewart v. Armel, 62 Ind. 593.

entry of satisfaction.<sup>1</sup>  
 vacated to the pre-  
 jury who became such  
 the record to be satisfied.<sup>2</sup>  
 an entry of satisfaction,  
 serious doubts arise upon the  
 judgment was or was not dis-  
 light to decline to determine the issue  
 cant to seek redress by suit.<sup>3</sup> And in  
 is no doubt that an entry of satisfaction  
 ved from for any reason adequate to justify  
 ang of relief from any other acknowledgment  
 ang, such as that the acknowledgment of satisfac-  
 a was procured by fraud or mistake, or made without  
 authority or in consideration of an agreement which de-  
 fendant refuses to perform.<sup>4</sup>

**§ 479. Other Means of Satisfaction.**—Every judgment continues in force until paid to or released by plaintiff, discharged by proceedings under execution, or under acts for the relief of insolvent debtors, or until barred by the statutes of limitation, or merged in another judgment. Plaintiff may waive his rights in one instance without prejudicing his claims in others. Thus A, having two judgments against B, sold land of the latter under the junior judgment, producing a sum more than sufficient for its satisfaction. He made no claim for the surplus under the lien of his elder judgment, but permitted it to be taken by another creditor. The court held that he did not thereby lose his judgment, but might proceed to satisfy it out of B's other property.<sup>5</sup> If the defendant delivers to the plaintiff a promissory note of third parties in satisfaction of the judgment, which note is void because

<sup>1</sup> Wallace v. Berdell, 105 N. Y. 7;  
 Farmer v. Sasseen, 63 Iowa, 110.

<sup>2</sup> Persons v. Shaeffer, 65 Cal. 79.

<sup>3</sup> McDonald v. Falvey, 18 Wis. 571;  
 Chapman v. Blakeman, 31 Kan. 684;  
 Hill v. Herman, 59 N. Y. 396.

<sup>4</sup> Stuart v. Peay, 21 Ark. 117; Moore  
 v. Cairo etc. R. R. Co., 36 Ark. 262;  
 Evans v. Holt, 4 Baxt. 389; Maclary  
 v. Reznor, 3 Del. Ch. 445.

<sup>5</sup> Bank of Penn. v. Winger, 1 Rawle,  
 295; 18 Am. Dec. 633.

fraudulently obtained, it is not necessary for plaintiff to return the note before taking out execution.<sup>1</sup> If an entry of satisfaction on the record was made in consideration of a note which, by mistake, was for too small a sum, an action may be sustained for the unsatisfied part.<sup>2</sup> In several of the states, when property is seized under execution, the defendant may obtain possession of it by giving a forthcoming or delivery bond, by which he and his sureties undertake that it shall be redelivered to the officer, to be sold at the time and place fixed for the sale; and when the officer returns such bond forfeited for a breach of condition, execution may issue thereon against the obligors in the bond. The statutory judgment arising from this return of forfeiture is often regarded as a merger and satisfaction of the original judgment,<sup>3</sup> which, however, may be vacated by quashing the bond, and in equity is sometimes treated as vacated, and the original judgment as remaining in force, though no order has been made quashing the bond, "if it be faulty on its face, or the security when taken be insufficient, or the obligors, though solvent when the bond is taken, become insolvent afterwards."<sup>4</sup>

If a judgment debtor is merely a surety for the payment of the debt for which judgment is recovered against him, and this fact is known to the judgment creditor, any indulgence given to the principal debtor, sufficient to release the surety had it been given before judgment, has a like effect if given afterwards.<sup>5</sup>

A judgment, though not fully paid, may be satisfied by a release under seal.<sup>6</sup> A seal is by the common law essential to the technical release of a judgment;<sup>7</sup> and a

<sup>1</sup> *Mitchell v. Hockett*, 25 Cal. 538; 85 Am. Dec. 151.

<sup>2</sup> *Canfield v. Miller*, 13 Gray, 274.

<sup>3</sup> *Bank of United States v. Patton*, 5 How. (Miss.) 200; 35 Am. Dec. 428; *Witherspoon v. Spring*, 3 How. (Miss.) 60; 32 Am. Dec. 310; *Jones v. Farquhar*, 1 A. K. Marsh, 29; *Douglas v. Twombly*, 25 Ark. 124; *Freeman on Executions*, sec. 264.

<sup>4</sup> *Rhea v. Preston*, 75 Va. 757; *Jones v. Myrick's Ex'r*, 8 Gratt. 179.

<sup>5</sup> *Westervelt v. Fresh*, 33 N. J. Eq. 451; *ante*, sec. 226.

<sup>6</sup> *Braden v. Ward*, 42 N. J. L. 518.

<sup>7</sup> *Whitehill v. Wilson*, 3 Penn. & W. 406; 24 Am. Dec. 326; *Davis v. Bowker*, 1 Nev. 487.

sealed release of one joint judgment debtor released the others.<sup>1</sup> Releasing the lien of a judgment as to certain real estate does not impair the plaintiff's right to proceed against other property of the defendants, or of either of them.<sup>2</sup>

PART IV.

§ 480. *Proceedings after Satisfaction.* — While the courts have generally protected all third persons, acting *bona fide* and without notice, on their confidence in judicial records, from "all secret vices and infirmities" in the proceedings of the courts or of their officers, this protection, it seems, has not been extended so as to shield purchasers from the perils of secret satisfactions of judgments. The laws usually, if not universally, provide that the entry of satisfaction may be made on the docket, and that the execution, with a memoranda of the proceedings under it, shall be returned to court, and thus lead purchasers to expect that if, from an examination of the dockets and papers on file in the case, no release or satisfaction of the judgment is disclosed, that none in fact exists. Principles of public policy are said to require that bidders at judicial sales shall have confidence in the titles there to be acquired; and that in order to create such confidence, they should not be prejudiced by any defect not known to them, nor discoverable by examining the record. Therefore it seems that good faith toward purchasers, as well as the principles of public policy recognized and enforced for the benefit of the whole community, demands that purchasers and other third persons acting in good faith should not be injured through secret releases, in order to preserve the interests of those persons whose negligence in not making those releases apparent on the record produced the mistake of fact under which the purchaser acted. Nevertheless, we have the authority of many cases showing that a sale or

<sup>1</sup> *Powell v. Davis*, 60 Ga. 70.

<sup>2</sup> *Gegner v. Warfield*, 72 Iowa, 11; *Gardner v. Baker*, 25 Iowa, 343.

other proceeding under a satisfied judgment *is void under all circumstances*.<sup>1</sup> The reasoning on which these cases are based was thus stated by the court of appeals of the state of New York: "The judgment was the sole foundation of the sheriff's power to sell and convey the premises, and if the judgment was paid when he undertook to sell and convey, his power was at an end, and all his acts were without authority and void. The purchaser under a power is chargeable with notice, if the power does not exist, and purchases at his peril."<sup>2</sup> There are, however, a few authorities tending to establish the proposition that a sale under a judgment satisfied in fact, but not of record, is valid if made to a stranger to the execution having no notice, actual or constructive, of its satisfaction.<sup>3</sup>

Where a judgment is alleged to have been satisfied in fact, the court may doubtless entertain a motion to have the satisfaction entered of record, and may grant such motion, and quash any outstanding execution if the facts as alleged are clearly established.<sup>4</sup> If, however, the facts are not conceded, and an issue of fact is presented, the court ought not to determine such issue upon motion, but should leave the parties at liberty to try it in some appropriate suit.<sup>5</sup>

§ 480 a. *Appeal after Satisfaction.* — The general principle that the payment of a judgment produces a perma-

<sup>1</sup> *Swan v. Saddlemere*, 8 Wend. 876; *Lewis v. Palmer*, 6 Wend. 368; *Wood v. Colvin*, 2 Hill, 566; 38 Am. Dec. 598; *State v. Salyers*, 19 Ind. 432; *Neilson v. Neilson*, 5 Barb. 565; *Hammatt v. Wyman*, 9 Mass. 138; *Carpenter v. Stilwell*, 11 N. Y. 61; *Laval v. Rowley*, 17 Ind. 36; *Durette v. Briggs*, 47 Mo. 361; *Shelly v. Lash*, 16 Minn. 498; *Hunter v. Stevenson*, 1 Hill (S. C.) 415; *Murrell v. Roberts*, 11 Ired. 424; 53 Am. Dec. 419; *McClure v. Logan*, 59 Mo. 234; *Carnes v. Platt*, 59 N. Y. 411; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 560; 26 Am. Rep. 627; *Drefahl v. Tuttle*, 42 Iowa, 177; *Terry v. O'Neal*, 71 Tex. 592.

<sup>2</sup> *Craft v. Merrill*, 14 N. Y. 456.

<sup>3</sup> *Morton v. Grenada*, 8 Smedes & M. 773; *Doe v. Ingersoll*, 11 Smedes & M. 249; 49 Am. Dec. 57; *Banks v. Evans*, 10 Smedes & M. 35; 48 Am. Dec. 734; *Jackson v. Cadwell*, 1 Cow. 622; *Ladlington v. Peck*, 2 Conn. 700; *Boren v. McGehee*, 6 Port. 432; 31 Am. Dec. 695; *Van Campen v. Snyder*, 3 How. (Miss.) 66; 32 Am. Dec. 311; *Hoffman v. Strohecker*, 7 Watts, 86; 32 Am. Dec. 740.

<sup>4</sup> *Russell v. Hugunin*, 1 Seam. 562; 33 Am. Dec. 423; *Smock v. Dade*, 5 Rand. 639; 16 Am. Dec. 780; *Adams v. Smallwood*, 8 Jones, 258.

<sup>5</sup> *McCutcheon v. Allen*, 96 Pa. St. 318.

ment and irrevocable discharge of it has been thought to apply to the right of appeal, and it has been insisted that a paid judgment or a judgment otherwise satisfied is so obliterated that it no longer exists as a subject of review.<sup>1</sup> If the party in whose favor a judgment is rendered receives payment thereof, or seeks by the issuing on an execution to compel such payment, he probably estops himself from taking an appeal from such judgment, or from further prosecuting an appeal previously taken, on the principle that one will not be permitted to accept and retain the fruits of a judgment and at the same time to insist that it is erroneous.<sup>2</sup> But there are other cases permitting parties to accept sums to which they have been declared entitled, and afterward to show upon appeal that they were entitled to larger sums.<sup>3</sup> One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice, and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. Nevertheless there are cases deciding that one paying a judgment against him precludes all appeal therefrom.<sup>4</sup> The better view, we think, is, that though execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of his right to appeal,<sup>5</sup> though there may be circumstances in which a defendant by paying part of a judgment to gain a special advantage may estop himself from prosecuting an appeal.<sup>6</sup>

<sup>1</sup> *Morton v. Super. Ct.*, 65 Cal. 496.

<sup>2</sup> *Knapp v. Brown*, 45 N. Y. 207; *Knox v. Steele*, 18 Ala. 815; 54 Am. Dec. 181; *In re Baby*, 87 Cal. 200; 22 Am. St. Rep. 239; *People v. Burns*, 78 Cal. 645; *Alexander v. Alexander*, 104 N. Y. 643; *Murphy v. Murphy*, 45 Ala. 123; *Holt v. Reid*, 46 Ill. 181; *Corwin v. Shoup*, 76 Ill. 246; *Altoona v. Delaware*, 44 Iowa, 201; *Fly v. Bailey*, 37 Pa. St. 366; *Lamphey v. Henk*, 16 Minn. 405; *Hall v. Lacy*, 37 Pa. St. 366.

<sup>3</sup> *Catlin v. Wheeler*, 49 Wis. 507; *Higbie v. Westlake*, 14 N. Y. 281; *Meaders v. Gray*, 60 Miss. 400; 45 Am. Rep. 414; *Clowes v. Dickenson*, 8 Cow. 330; *Erwin v. Lowry*, 7 How. 172.

<sup>4</sup> *Sager v. Moy*, 15 R. I. 528; *Borghalious v. Farmers' & M. I. Co.*, 36 Iowa, 250.

<sup>5</sup> *Richeson v. Ryan*, 14 Ill. 74; 56 Am. Dec. 493; *Hatch v. Jacobson*, 94 Ill. 584; *Page v. People*, 99 Ill. 418.

<sup>6</sup> *Smith v. O'Brien*, 146 Mass. 294.

## CHAPTER XXI.

## REVERSED JUDGMENTS.

- § 481. Effect of reversal.
- § 482. Restitution between the parties.
- § 483. Cases denying restitution between the parties.
- § 484. Restitution from third persons.

§ 481. **Effect of.** — The reversal of a judgment by any competent authority restores the parties litigant to the same condition in which they were prior to its rendition. The judgment reversed becomes mere waste paper; and the parties to it are allowed to proceed in the court below to obtain a “final determination of their rights” in the same manner and to the same extent as if their cause had never been heard or decided by any court.<sup>1</sup> Neither, in the subsequent prosecution of the cause, can suffer detriment nor receive assistance from the former adjudication. An exception to this rule exists when a cause is remanded for further proceedings in accordance with the opinion of the court, and those proceedings do not involve a re-examination of all the issues disposed of by the original judgment. In an action involving an accounting, the judgment was reversed because of an error of the court in allowing and computing interest on monthly balances due the plaintiff. When the cause again came up for hearing in the trial court, the plaintiff insisted that the cause should be tried anew upon all the issues, and that the intervener therein should offer evidence to support the complaint of intervention. Thereupon it was determined that the trial court need not try anything anew except the issue formerly erroneously decided by it, and should “in other respects pass upon the issues in the light of the testimony already before it, or adopt the facts

<sup>1</sup> *Ragan v. Cuyler*, 24 Ga. 400; *ville G. Co. v. Zanesville*, 47 Ohio St. 35.  
*French v. Edwards*, 4 Saw. 125; *Zanes-*

already found upon such testimony.”<sup>1</sup> If a judgment of reversal is reversed by a superior tribunal, this last reversal reinstates the original judgment.<sup>2</sup> A reversal by agreement, or upon confession of errors, is as potent as though it were the result of the most persistent litigation.<sup>3</sup> If a judgment is reversed, and remanded for a new trial, after which the plaintiff dismisses his action, or becomes nonsuit, the matters decided in the action are not *res judicata* because the appeal and reversal destroyed the judgment entered in the action, and the subsequent dismissal or nonsuit prevented the entry of any judgment finally determining the rights of the parties.<sup>4</sup> A judgment having been recovered in a justice’s court, the defendant paid it; but afterward he appealed, and obtained a reversal on technical grounds, by which he was awarded restitution and his costs of appeal. He did not collect the sum to which he was entitled under the judgment of restitution. The plaintiff commenced another action for the same cause. The defendant then pleaded as a bar the former judgment and its payment. The court held that by the proceedings on appeal in the first suit the judgment therein had been extinguished; that the payment made in the former suit was on the judgment, and not on the antecedent debt; that such debt was still in force, unaffected by the reversed judgment and its payment; and that the defendant could plead his judgment obtained on appeal as an offset, but not as a bar, in the present action.<sup>5</sup> Where a judgment is against two or more persons, one only of whom appeals, its reversal, if the judgment was binding upon the defendants jointly, or if all must co-operate in complying with the judgment, affects the parties who did not appeal to the same extent as those who did.<sup>6</sup> But if a defendant does not appeal, and is not

<sup>1</sup> *Chandler v. People’s S. B.*, 73 Cal. 317; 2 Am. St. Rep. 812.

<sup>2</sup> *Simmons v. Price*, 18 Ala. 406; *Argenti v. San Francisco*, 30 Cal. 458; *Stearns v. Aguirre*, 7 Cal. 443; *Phelan v. San Francisco*, 9 Cal. 16; *Mead v. Mead*, 18 Barb. 578.

<sup>3</sup> *Maghee v. Collins*, 27 Ind. 83.

<sup>4</sup> *Bucher v. Cheshire R. R. Co.*, 125 U. S. 553.

<sup>5</sup> *Cloze v. Stuart*, 4 Wend. 95.

<sup>6</sup> *Pittsburgh etc. R’y Co. v. Reno*, 123 Ill. 273.



made a party to the appeal by the service on him of notice thereof, an appeal by his co-defendant, followed by a reversal of the judgment, cannot authorize the retrial of the cause as against the non-appealing defendant, and the new trial must be confined to the issues between the parties to the appeal.<sup>1</sup> The effect of a reversal is not impaired by the fact that during the pendency of the suit, or after the entry of the judgment in the trial court, the party there successful sells and conveys the subject-matter of litigation to a stranger. Hence if after judgment is entered quieting plaintiff's title to a tract of land, he conveys it, his grantee accepts the hazard of having such judgment reversed.<sup>2</sup>

§ 482. **Restitution between the Parties.**— Upon the reversal of the judgment against him, the appellant is entitled to the restitution from the respondent of all the advantages acquired by the latter by virtue of the erroneous judgment. The successful appellant is entitled to a restitution of everything still in possession of his adversary in specie; not the *value*, but the *thing*.<sup>3</sup> If money has been collected by the plaintiff in the judgment, whether under execution or not, an action lies against him to recover it back.<sup>4</sup> The statute of limitations commences running in relation to such actions in favor of respondent from the time of the reversal.<sup>5</sup> If the plaintiff purchases the property of the defendant at a sale under a judgment or decree, his title will be defeated by a subsequent reversal.<sup>6</sup> But a subsisting judgment, though afterward reversed, is a sufficient justification for all acts done by plaintiff in enforcing it prior to the re-

<sup>1</sup> Withers v. Jacks, 79 Cal. 297; 12 Am. St. Rep. 143.

<sup>2</sup> Lord v. Hawkins, 39 Minn. 73.

<sup>3</sup> Gott v. Powell, 41 Mo. 416; Bickett v. Garner, 31 Ohio St. 28.

<sup>4</sup> Raun v. Reynolds, 18 Cal. 275; Scholey v. Halsey, 72 N. Y. 578; Ex parte Walter Bros., 89 Ala. 237; 18 Am. St. Rep. 103.

<sup>5</sup> Crocker v. Clements, 23 Ala. 296.

<sup>6</sup> Gott v. Powell, 41 Mo. 416; Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459; Twogood v. Franklin, 27 Iowa, 239; Marks v. Cowles, 61 Ala. 299; Gould v. Sternburg, 128 Ill. 510; 15 Am. St. Rep. 138; Adams v. Odom, 74 Tex. 206; 15 Am. St. Rep. 827; Welcker v. Staples, 88 Tenn. 49; 17 Am. St. Rep. 869.

versal. Thus if the defendant is taken in execution, the subsequent reversal of the judgment will not render the plaintiff liable to an action for false imprisonment; for the act of imprisonment, when directed by the plaintiff, was sanctioned by a then valid judgment.<sup>1</sup> Whether the defendant may elect to affirm the sale, notwithstanding the reversal of the judgment, and recover of the plaintiff the damages resulting therefrom, is an unsettled question. In California, the defendant may, at his election, affirm the sale, and recover of plaintiff the value of the property lost thereby.<sup>2</sup> On the other hand, it has been held that the losing party has the right to restore the *thing* sold, and when he can do so, cannot be required to account for its value. If the judgment is modified by reducing its amount, the appellant cannot compel the respondent to keep the property purchased, and to pay the difference between the amount at which it was sold under execution and the amount of the judgment as modified.<sup>3</sup> If the property sold consisted of stock in a corporation which has deteriorated in value, plaintiff is not required to account for the value of the stock at the time of the sale, nor to retain it at the amount of his bid.<sup>4</sup> As to the amount which the defendant may recover when the property sold is not restored to him, the courts, other than those in California, agree that it cannot exceed the amount realized at the sale thereof. In other words, plaintiff is not required to restore a sum in excess of that which he received under his judgment.<sup>5</sup> An assignee of a judgment is not a stranger thereto. If he takes out execution and sells the defendant's property, and becomes the purchaser thereof, and the judgment is subsequently

<sup>1</sup> *Simpson v. Horenbeck*, 3 Lans. 53.

<sup>2</sup> *Reynolds v. Hosmer*, 45 Cal. 630.

<sup>3</sup> *Munson v. Plummer*, 58 Iowa, 736.

<sup>4</sup> *Fort M. L. Co. v. Batavia Bank*, 77 Iowa, 393.

<sup>5</sup> *Peck v. McLean*, 36 Minn. 228; 1 Am. St. Rep. 665; *Gay v. Smith*, 38

N. H. 171; *McGuire v. Ely, Wright*, 520; *Bryant v. Fairfield*, 51 Me. 154; *Eames v. Stevens*, 26 N. H. 117; *Backhurst v. Mayo, Dyer*, 363; *Bickerstaff v. Dellinger*, 1 Murph. 272; *Eyre v. Woodfine*, Cro. Jac. 278. See, however, *Gould v. Sternburg*, 128 Ill. 510; 15 Am. St. Rep. 133.

reversed, he stands in no better a position than the original plaintiff in like circumstances.<sup>1</sup> If a suit is brought to foreclose a lien, and another lien-holder is made a party defendant, and asserts his claim by cross-bill, and a decree is entered under which a sale is made to the defendant lien-holder, who pays the money into court, and the money is thereupon distributed by the court among all the lien-holders according to their priorities, such purchaser, though a party to the suit, is protected in his purchase from a subsequent reversal of the decree.<sup>2</sup> (If the judgment reversed was for the possession of property, the court will restore to such possession all persons who may have been dispossessed under its judgment.) An order for such restitution is deemed a part of the judgment of reversal.<sup>3</sup> During the period in which the defendants are dispossessed, other persons may enter upon the possession of the property, in addition to those placed in possession under the judgment. If these persons are in privity with those so placed in possession, no doubt restitution will be awarded against them. But instead of being in such privity, they may have entered under an adverse claim of title. Nevertheless it has been held that they must be dispossessed, because "the court cannot, without putting them out, undo its own wrong."<sup>4</sup> With respect to the mode of obtaining restitution after the reversal of a judgment, the practice is not uniform. Sometimes a writ of or order for restitution is obtained from the court rendering the judgment of reversal.<sup>5</sup> But we think the more usual practice is to proceed by petition, rule, or motion

<sup>1</sup> Reynolds v. Hosmer, 45 Cal. 630; McJilton v. Love, 13 Ill. 486; 54 Am. Dec. 449.

<sup>2</sup> Murphy v. Longworth, 14 Ohio St. 349; 84 Am. Dec. 383. But the rule is otherwise if he receives the chief benefit of the sale: Walpole v. Ink, 9 Ohio St. 143.

<sup>3</sup> Perry v. Tupper, 70 N. C. 533; Watson v. Trustees, 2 Jones, 212; Hall v. Wells, 54 Miss. 289; Shaw v. Flem-

ing, 5 Houst. 155; Fish v. Toner, 40 Minn. 211; Perry v. Tupper, 71 N. C. 385; Lytle v. Lytle, 94 N. C. 522; Runyon v. Hall, 10 Ark. 476.

<sup>4</sup> Quan Wo Chung v. Lanmeister, 83 Cal. 384; 17 Am. St. Rep. 261.

<sup>5</sup> Hall v. Wells, 54 Miss. 289; Vroman v. Dewey, 23 Wis. 626; Market N. B. v. Pacific N. B., 102 N. Y. 464; Ex parte Morris, 9 Wall. 603.

in the trial court, which will thereupon order restitution to be made.<sup>1</sup> The right to restitution cannot in any case be resisted on the ground that on the final hearing of the cause it will appear that the party of whom restitution is sought is entitled to the property of which he got possession, or of the money which he received under the reversed judgment.<sup>2</sup> In addition to the remedy by application to the court in the original action, resort may be had to an independent action to recover property remaining in the possession of the respondent and acquired under the judgment, or moneys received by him in satisfaction thereof.<sup>3</sup>

§ 483. **Cases Denying Restitution between the Parties.**—We have stated in the preceding section that a plaintiff purchasing at a sale under his own execution is liable to the loss of the property thus bought, upon the reversal of his judgment. This statement we believe is fully supported by the present state of the authorities. While the decisions directly in point may not be numerous, the expressions made in a large number of cases show that the opinion of the judges has been nearly unanimous to the effect that the plaintiff cannot, after the reversal of his judgment, retain the property of the defendant acquired after such judgment. But the case of *Parker v. Anderson*, 5 T. B. Mon. 455,<sup>4</sup> decided in Kentucky nearly half a century ago, is authority to show "that the parties to a judgment or decree are, equally with all others, at liberty to bid and purchase property exposed for sale

<sup>1</sup> *Green v. Brengle*, 84 Va. 913; *Fleming v. Redick*, 5 Gratt. 272; 50 Am. Dec. 119; *Munson v. Plummer*, 58 Iowa, 736; *Gregory v. Litsay*, 9 B. Mon. 43; 48 Am. Dec. 415; *Reynolds v. Harris*, 14 Cal. 687; 76 Am. Dec. 459; *Nesbitt v. Dallam*, 7 Gill & J. 512; 28 Am. Dec. 236.

<sup>2</sup> *Ex parte Walter Bros.*, 80 Ala. 237; 18 Am. St. Rep. 103.

<sup>3</sup> *Duncan v. Kirkpatrick*, 13 Serg. & R. 292; *Travelers Ins. Co. v. Heath*,

95 Pa. St. 333; *Magher v. Kellogg*, 24 Wend. 30; *Reynolds v. Hosmer*, 45 Cal. 616; *McJilton v. Love*, 13 Ill. 486; 54 Am. Dec. 449.

<sup>4</sup> See also *Gossom v. Donaldson*, 18 B. Mon. 230; 68 Am. Dec. 723; *Yocum v. Foreman*, 7 Rep. 526. This rule cannot apply where the judgment is reversed because it is void. Here there must be restitution, for there was never a valid judgment: *Smith v. Bohon*, 12 Bush, 448.

under a judgment or decree, and there is the same reason for protecting the same interests acquired by a party under a purchase as that of a stranger." The doctrine thus laid down was recognized and reasserted by Justice Field, of the supreme court of the United States, in a case decided by him in the ninth circuit. In this case he said: "Expressions were cited from various opinions of different judges to the effect that by the reversal the defendant or unsuccessful party in the court below is to be restored to all things which he lost by the erroneous judgment or decree, and that protection is afforded to strangers at judicial sales, in order to encourage bidding. Expressions of this kind may be very just and appropriate in connection with the principal facts of the special cases in which they are used; but they do not express a rule applicable in all cases, or furnish the true reason for the protection extended to purchasers at judicial sales. The principle that the defendant or unsuccessful party in the court below is to be restored to *all things* which he lost by the erroneous judgment or decree cannot apply to those things the title of which may be transferred by proceedings taken for the enforcement of the judgment or decree, when its enforcement is not stayed pending the appeal. The restoration in specie in such cases being impossible without infraction of the principle by which judgments of courts are upheld and enforced, it follows that the right which the reversal gives must be that of action to recover an equivalent for the lost thing. And perhaps the rule may be stated thus: That the defendant or unsuccessful party in the court below is to be restored by reversal to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the previous enforcement of the judgment or decree, and in such case he is to have a right of action for a money equivalent. The rule as thus stated would leave the parties to take advantage of the proceedings for the enforcement equally with third persons. There is no reason why they should

not have the same protection extended to them as to strangers. The judgment or decree is equally binding upon all, and should be equally efficacious for protection. When the judgment or decree directs a sale of property of the defendant, it may be regarded as a power of attorney to the officer charged with its execution created by the law, and, like any other power, sufficient to give validity to the acts of the officer until the power is revoked by the reversal. There is no prohibition in the law, or objection in the reason of the thing, against a party taking advantage of the proceedings had for the enforcement of the judgment which he has recovered. Strangers are protected, not because a contrary rule would discourage bidding, but because they have a right to rely upon the validity of the judgment and invoke its protection for all acts done under it whilst it is in force, and for the rights they have acquired thereby." Judge Field then proceeded to quote at length from the opinion of the court in *Parker v. Anderson*, 5 T. B. Mon. 455, and added, after such quotation, that "with the views thus forcibly expressed we fully concur."<sup>1</sup>

§ 484. **Restitution from Third Persons.**—The law permits judgments and decrees to be enforced during the time in which appeals may be taken, and also while appeals are pending and undetermined, unless some bond or other security given as required by law operates to stay the proceedings. Courts have always construed the law so as to impart confidence in judicial sales by protecting purchasers thereat from those ill consequences which the latter might suffer if the title acquired by them depended upon the freedom of prior proceedings from all errors of law. It was thought to be unjust to require purchasers to suffer for errors committed by the judges of the

<sup>1</sup> *South Fork Canal Co. v. Gordon*, 2 Abb. 479, 488. Judge Field, by whom the above case was decided, has since, in *Galpin v. Page*, 18 Wall. 350, shown that he is fully conscious that the principles announced by him, and quoted above in the text, are against the weight of the authorities.

subordinate courts, and impolitic, by making such a requirement, to discourage bidders at such sales, and thereby to expose large amounts of property to the hazard of being sacrificed at nominal prices. Therefore it is a rule, nowhere disputed, that third persons purchasing at a sale made under the authority of a judgment or decree, not suspended by any stay of proceedings, thereby acquire rights which no subsequent reversal of such judgment or decree can in any respect impair.<sup>1</sup> Nor is the fact that the purchaser was notified not to purchase, because the judgment was claimed to be erroneous, and that an attempt would be made to procure its reversal, of any consequence.<sup>2</sup> In Illinois, while it is conceded that a purchase by the plaintiff in the judgment is subject to be annulled by a subsequent reversal, the assignee from plaintiff of the certificate of purchase, under an assignment made before any reversal, is held to occupy as favorable a position as if he, instead of being an assignee, were the original purchaser at the sale.<sup>3</sup> Such, also, is the rule in Missouri. "The purchaser in such cases must be regarded as a purchaser without notice, since he buys from a party who derives title from a judgment and execution valid at the time, and really occupies the same position as if he had

<sup>1</sup> Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459; Farmer v. Rogers, 10 Cal. 335; Hubbell v. Broadwell's Heirs, 8 Ohio, 120; Hanschild v. Stafford, 27 Iowa, 301; Frost v. McLeod, 19 La. Ann. 69; Lovett v. German Reformed Church, 12 Barb. 67; Coster v. Peters, 7 Rob. (N. Y.) 386; 4 Abb. Pr., N. S., 53; Pitfield v. Gazzam, 2 Ala. 325; Gott v. Powell, 41 Mo. 416; Dorsey v. Thompson, 37 Md. 25; Feaster v. Fleming, 56 Ill. 457; Fergus v. Woodworth, 44 Ill. 374; Ward v. Hollins, 14 Md. 158; Stroud v. Casey, 25 Tex. 740; 78 Am. Dec. 556; Stinson v. Ross, 51 Me. 556; 81 Am. Dec. 591; Jesup v. City Bank, 15 Wis. 604; 82 Am. Dec. 703; Taylor v. Lauer, 26 La. Ann. 307; Marks v. Cowles, 61 Ala. 299; Wood v. Jackson, 8 Wend. 9; 22 Am. Dec. 603; Lesslie v. Richardson, 60 Ala. 563; Porter v. Robinson, 3 A. K. Marsh. 253; 13 Am. Dec. 153; Woodcock v. Bennett, 1 Cow. 711; 13 Am. Dec. 568; Freeman on Executions, sec. 345; Little v. Bunce, 7 N. H. 485; 28 Am. Dec. 363; Goudy v. Hall, 36 Ill. 313; 87 Am. Dec. 217; Sutton v. Schonwald, 86 N. C. 198; 41 Am. Rep. 455; Gibson v. Lyon, 115 U. S. 439; Corwithe v. State Bank, 18 Wis. 560; 86 Am. Dec. 793. Notwithstanding the numerous authorities to the contrary, it was said in a case decided in New York to be conceded that the reversal of a decree invalidates a sale made thereunder: Wambaugh v. Gates, 8 N. Y. 144.

<sup>2</sup> Irwin v. Jeffers, 3 Ohio St. 389.

<sup>3</sup> Guiteau v. Wiseley, 47 Ill. 433; Horner v. Zimmerman, 45 Ill. 14; Wadhams v. Gay, 73 Ill. 422.

himself bought at the sheriff's sale. Whilst, therefore, the title of the plaintiff in the execution would be annulled by the reversal of the judgment, the sale or conveyance by the plaintiff to a third person before the reversal of the judgment would be valid, and the purchaser, supposing the purchase to be in good faith, would be protected from the risks which his vendor would be subject to."<sup>1</sup> On the other hand, after a very thorough consideration, this question has received an entirely different answer from the supreme court of Alabama.<sup>2</sup> This court very justly concluded that "the right of a party aggrieved by an erroneous judgment to a restoration to the condition in which he was when it was rendered would be of little avail if through the mechanism of an alienation to a party bound to know that the right exists it could be defeated"; and the court shows by the common-law authorities that upon the reversal of a judgment lands extended upon *elegit* were revested in the defendant, though the plaintiff had in the mean time sold and conveyed them to a stranger.<sup>3</sup> The rule which protects strangers purchasing at judicial sales from loss of title by a reversal of the judgment was doubtless adopted from considerations of public policy, which required that such strangers should be encouraged to bid, and the danger of the sacrifice of the debtor's property by a sale for less than its value thereby diminished. This object is in no respect promoted by an extension of the rule to purchasers who do not bid at the forced sale. Neither the interests of the community in general, nor of the class whose property is to be sold under execution, can be in any degree shielded from sacrifice by this extension, which, *after the sale has been made*, and the sacrifice has been realized or avoided,

<sup>1</sup> *Vogler v. Montgomery*, 1 Cent. L. J. 65; 54 Mo. 577; *McCormick v. McClure*, 6 Blackf. 486; 39 Am. Dec. 441; *McAusland v. Fundt*, 1 Neb. 211; 93 Am. Dec. 358; *Taylor v. Boyd*, 3 Ohio, 337; 17 Am. Dec. 603.

<sup>2</sup> *Marks v. Cowles*, 61 Ala. 299. To the same effect, *Adams v. Odom*, 74 Tex. 206; 15 Am. St. Rep. 827.

<sup>3</sup> *Goodyere v. Ince*, Cro. Jac. 246; *Bryant v. Fairfield*, 51 Me. 154; *Delano v. Wilde*, 11 Gray, 17; 71 Am. Dec. 687.



merely authorizes the purchaser to transfer a better title than he ever acquired.

In Iowa, a statute provides that property acquired by a *bona fide* purchaser shall not be affected by a future reversal of the judgment. A purchase at an execution sale having been made by the attorney of the plaintiff, and the judgment being afterward reversed, the question arose whether an attorney of the plaintiff could be a *bona fide* purchaser within the meaning of the statute. The court held that "a purchase of land at a sheriff's sale by the plaintiff in execution or his attorney, with actual knowledge of the pending appeal, is at the peril of the purchaser, and the party or his attorney thus buying is not, within the meaning of the statute, a *bona fide* purchaser."<sup>1</sup> It was further intimated by the judge delivering the opinion of the court that he doubted whether any person having notice of a pending appeal is protected by this statute as a *bona fide* purchaser. This statute is, undoubtedly, a mere declaration of the previous common-law rule; and, like that rule, was adopted in furtherance of the policy of encouraging *bona fide* bidding at involuntary sales. The fact of notice of the pendency of an appeal, therefore, cannot be material in determining whether a purchaser should be protected by the statute. The taking of an appeal is a matter always easily ascertained by an examination of the papers on file in the clerk's office; and if knowledge in relation to this fact affected the rights of purchasers, no hardship would result from requiring them to make such an examination. But the greater the number of persons having information of the appeal, the fewer, according to the views of this judge, would be the number qualified to become *bona fide* purchasers, and the greater would be the diminution of that competition which the statute was, no doubt, designed to encourage. We can see no reason why an attorney may not be a *bona fide* bidder. If no stay of execution is procured by the

<sup>1</sup> Twogood v. Franklin, 27 Iowa, 232.

defendant, the sale may, at the option of the plaintiff, proceed, though an appeal is taken and every person in the state notified of that fact. The interests of defendants in general require that *everybody* may bid. If the attorney is prohibited or discouraged from bidding, the defendant is thereby injured by the decrease in competition. If an attorney complies with his bid, by payment out of his own funds, on what grounds is it less a *bona fide* bid than if made by some other person? The title of plaintiff is held to be liable to be divested by a reversal, because his purchase is paid for by a judgment which he ought not to have had, and because it is neither just to the defendant nor conducive to a good public policy that the advantages secured by an erroneous adjudication should be longer retained. But an attorney who has paid the amount of his bid, with or without notice of an appeal, stands in a different position from that of a party to the suit, and in a similar position to that of a third person purchasing, and he ought therefore to be subjected to none of the perils visited on the former, and entitled to all the privileges secured by law to the latter. It is clear that an attorney is as much affected by the irregularity of process which he takes out as his client is, and that if the irregularity is such as to avoid a sale made to the client, it will equally avoid a sale made to the attorney.<sup>1</sup> On this ground it has been assumed to be, and probably is, well settled that the plaintiff's attorney, if a purchaser at the sale, is liable to lose his title by the reversal of the judgment.<sup>2</sup> But notwithstanding these decisions we cannot avoid thinking that there is a vast difference between an irregularity in which an attorney participates, and a perfectly regular proceeding in which the only vice is an honest error of law made by the court, and that this difference ought to lead to a corresponding difference in

<sup>1</sup> *Simonds v. Catlin*, 2 Caines, 63.

Wall. 350; *Hannibal etc. R. R. Co. v.*

<sup>2</sup> *Stroud v. Casey*, 25 Tex. 754; 78  
Am. Dec. 556; *Galpin v. Page*, 18

*Brown*, 43 Mo. 294.

the law applicable to the two cases. If the money collected under a valid judgment is received by the plaintiff's attorneys, who pay it over to their client,<sup>1</sup> or apply it by his direction in payment of a debt due from him to them, they are not, on the subsequent reversal of the judgment, answerable to the appellant for the amount so received.<sup>2</sup> The same rule applies when the moneys are paid to any other agent of the plaintiff, who pays it over to him, though such agent, when the payment is made, is notified that it is the intention of the payor to sue out a writ of error to reverse the judgment.<sup>3</sup>

<sup>1</sup> *Green v. Brangle*, 84 Va. 913.

<sup>2</sup> *Bank of United States v. Bank of*

<sup>3</sup> *Langley v. Warner*, 3 N. Y. 327.

*Washington*, 6 Pet. 8.

## CHAPTER XXII.

## RELIEF IN EQUITY FROM JUDGMENTS AND DECREES.

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**§ 484 a. Relief—Against What Adjudications Granted.**

— The adjudication against which relief is sought may be either,—1. A judgment in some criminal prosecution imposing a fine or other punishment; 2. A decree in

equity; 3. A judgment at law; or 4. An order, judgment, or decree of some other judicial tribunal entered in some civil action or proceeding of which it had or assumed jurisdiction. In the case of a criminal prosecution, equity will rarely, and we think will never, interpose.<sup>1</sup> In all other cases, unless the matter is one the jurisdiction over which is exclusively committed to some other tribunal, equity will grant relief under proper circumstances and for reasons such as call into action the power of its courts. Thus relief may be had from the decrees of ecclesiastical courts,<sup>2</sup> from awards of arbitrators,<sup>3</sup> from decrees of courts granting divorces,<sup>4</sup> and from settlements of the accounts of administrators, executors, and guardians made in surrogate, probate, or orphans' courts.<sup>5</sup> And where, as is usually the case, the relief consists in enjoining a party from taking advantage of an adjudication in his favor, there seems to be no reason why it may not be awarded against every kind of judgment, order, or decree which can be made in a civil action or proceeding, provided the circumstances are such that, in the view of a court of equity, it is unconscionable for him to retain the advantage thereof. The jurisdiction of equity to interfere in any way or to any extent with proceedings at law, though it excited the jealousy of the common-law judges, and was hotly contested, has been well established for nearly three centuries.<sup>6</sup> And there is no doubt of the power of a court of equity in one suit to grant relief from a decree entered

<sup>1</sup> Lord Montague v. Dudman, 2 Ves. Sr. 396; Holderstaffe v. Saunders, 6 Mod. 16; Gault v. Wallis, 53 Ga. 675; Moses v. Mayor of Mobile, 52 Ala. 198; Stuart v. Supervisors, 83 Ill. 341; 25 Am. Rep. 397; Tyler v. Hamersley, 44 Conn. 419; 26 Am. Rep. 479.

<sup>2</sup> Van Brough v. Cock, 1 Cas. Oh. 201; Bissell v. Artell, 2 Vern. 47.

<sup>3</sup> Cochran v. Eldridge, 49 Pa. St. 365; Emerson v. Udall, 13 Vt. 477; 37 Am. Dec. 604.

<sup>4</sup> Rawlins v. Rawlins, 18 Fla. 345; Ex parte Smith, 34 Ala. 455; Johnson v. Coleman, 23 Wis. 452; 99 Am. Dec.

193; post, sec. 489; Lawrence v. Lawrence, 73 Ill. 577.

<sup>5</sup> Black v. Whitall, 9 N. J. Eq. 572; 59 Am. Dec. 423; Green v. Creighton, 10 Smedes & M. 159; 48 Am. Dec. 742; Mock v. Steele, 34 Ala. 196; 73 Am. Dec. 455; Salter v. Williamson, 2 N. J. Eq. 480; 35 Am. Dec. 513; Elrod v. Lancaster, 2 Head, 571; 75 Am. Dec. 749.

<sup>6</sup> See 1 Spence's Eq. Jur., 673-675; note to Oliver v. Pray, 19 Am. Dec. 608; Phillips v. Negley, 117 U. S. 665; Cochran v. Eldridge, 49 Pa. St. 365, 368; Lloyd v. Mansell, 1 P. Wms. 73; Douglass v. Joyner, 57 Tenn. 32.

in another.<sup>1</sup> So relief may be had in equity when an administrator or other person has by fraud proceeded in the probate court to obtain the sale of the property of an estate.<sup>2</sup> The probate of a will and the grant of letters testamentary thereon are, however, regarded as matters over which chancery cannot exercise jurisdiction. Hence it has been held that relief in equity cannot be obtained against a will admitted to probate by showing that it was not the will of the decedent, but was forged by some other person, and its probate obtained by fraud and perjury.<sup>3</sup>

§ 485. *Mode of Obtaining and Granting Relief.*—In the case of a decree in equity the court may set it aside during the term in which it was entered.<sup>4</sup> If, however, the term has expired, and it is sought to impeach the decree for fraud, collusion, and the like, the remedy is by an original bill in the nature of a bill of review, which may be filed without leave of the court;<sup>5</sup> or if the party injured be an infant, he may proceed “either by a bill of review, or supplemental bill in the nature of a bill of review, or he may so proceed by original bill.”<sup>6</sup> If relief is based upon the ground of newly discovered evidence, it must be sought by bill of review.<sup>7</sup> If it is a judgment at law against which relief is claimed, the remedy at chancery is by original bill in the nature of a bill of review,<sup>8</sup> though according to some of the authorities the

<sup>1</sup> *Oro Fino Co. v. Cullen*, 1 Idaho, 113; *Daniell's Chancery Practice*, 4th Am. ed., 974, 1584, 1585.

<sup>2</sup> *Cowin v. Toole*, 31 Iowa, 513.

<sup>3</sup> *State v. McGlynn*, 20 Cal. 234; 81 Am. Dec. 118; *Colton v. Ross*, 2 Paige, 396; 22 Am. Dec. 648; *post*, sec. 608; *Gaines v. Chew*, 2 How. 645; note to *Schultz v. Schultz*, 60 Am. Dec. 354; *Waters v. Stickney*, 12 Allen, 1; 90 Am. Dec. 122.

<sup>4</sup> *Doss v. Tyack*, 14 How. 297.

<sup>5</sup> *Daniell's Chancery Practice*, 4th Am. ed., 974, 1584, 1585; citing *Lloyd v. Mansel*, 2 P. Wms. 73; *Sheldon v. Fortescue*, 3 P. Wms. 111; *Davenport v. Stafford*, 8 Beav. 503; 9 Jur. 801; *Evans v. Bacon*, 99 Mass. 213; *Patch v. Gray*, L. R. 3 Ch. App.

203; *Ex parte Smith*, 34 Ala. 455; *Pearson v. Nevitt*, 32 Miss. 180; *Edmondson v. Moseby's Heirs*, 4 J. J. Marsh. 501; *Terry v. Commercial Bank*, 92 U. S. 454.

<sup>6</sup> *Daniell's Chancery Practice*, 4th Am. ed., 164, 173; citing *Richmond v. Tayleur*, 1 P. Wms. 737; *Carew v. Johnson*, 2 Schoales & L. 292; *Brook v. Mostyn*, 10 Jur., N. S., 554; 13 Week. Rep. 115; 13 Beav. 457; 2 De Gex, J. & S. 373, 417.

<sup>7</sup> See note to *Brewer v. Bowman*, 20 Am. Dec. 160; *Connolly v. Connolly*, 9 Rep. 830.

<sup>8</sup> *Story's Eq. Pl.*, sec. 426; *Mussell v. Morgan*, 3 Brown Ch. 79; *Bennett v. Hamill*, 2 Schoales & L. 576.

bill is not considered an original bill unless it brings parties before chancery in addition to the parties to the judgment at law.<sup>1</sup> When relief is granted in chancery from a judgment at law, the interference is in all cases indirect. The judgment is not canceled nor vacated, nor is the court of law nor its judge enjoined from proceeding, nor is a new trial granted in express terms. A court of equity acts exclusively upon the person of the adverse party by preventing him from making an inequitable use of his judgment.<sup>2</sup> Sometimes he is restrained absolutely, and sometimes the injunction enjoins him from proceeding unless he first submits to a new trial.<sup>3</sup> The mode and extent of the relief may be varied, according to the circumstances of the case, to make the remedy both efficient and equitable. While it is true that the authority now given by statute to courts of law to grant new trials has very nearly dispensed with the necessity of resorting to chancery for that purpose, still, instances occasionally occur in which no application for a new trial is made in the original action, or if made, it was not disposed of on the merits, owing to the operation of some cause which is generally regarded as sufficient to invoke with success the aid and protection of courts of equity. In these instances chancery still has power to afford relief by requiring the successful party to submit to a new trial.<sup>4</sup> In some very peculiar cases a new trial has been decreed because the evidence of the facts constituting the complainant's defense was not discovered until after the entry of the judgment at law and the lapse of the time in

<sup>1</sup> *Denn v. Clarke*, 8 Pet. 1.

<sup>2</sup> *Blight v. Tobin*, 7 T. B. Mon. 612; 18 Am. Dec. 219; *Farmers' Bank v. Collins*, 13 Bush, 138; *Justice v. Scott*, 4 Ired. Eq. 108; *Given's Appeal*, 121 Pa. St. 280; 6 Am. St. Rep. 795; *Wynne v. Newman*, 75 Va. 811.

<sup>3</sup> *Yancey v. Downer*, 5 Litt. 8; 15 Am. Dec. 35, and note; *Hunt v. Boyier* 1 J. J. Marsh. 484; 19 Am. Dec. 116; *Gainty v. Russell*, 40 Conn. 450; *Floyd*

*v. Jane*, 6 Johns. Ch. 479; *Banks v. Shain*, 6 Litt. 451.

<sup>4</sup> *Carrington v. Holabird*, 17 Conn. 530; 19 Conn. 84; *Howe v. Martell*, 28 Ill. 445; *Shepard v. McIntyre*, 5 Dana, 576; *Mulford v. Cohn*, 18 Cal. 42; *Booth v. Stamper*, 6 Ga. 172; *Deputy v. Tobias*, 1 Blackf. 311; 12 Am. Dec. 243; *Knifong v. Hendricks*, 2 Gratt. 212; 44 Am. Dec. 385; *Carter v. Bennett*, 6 Fla. 214.

which he could there move for a new trial.<sup>1</sup> In some of the states, a new trial will be directed in equity, on the ground of newly discovered evidence, if the complainant was, when sued at law, acting in a representative capacity, without any personal knowledge of the facts constituting his defense;<sup>2</sup> or when the plaintiff must have known his demand to be unconscionable, as where, knowing that he had been paid in full, he obtained judgment because of the temporary inability of the defendant to find his receipt.<sup>3</sup> Bills in equity for new trials have been sustained where it was shown that the jury had been tampered with,<sup>4</sup> where the party was "taken by surprise, and evidence was produced at the trial which he could have no reason to expect would be produced";<sup>5</sup> where the cause was unexpectedly set for trial, at a special term of court, of which complainant had no knowledge;<sup>6</sup> when the verdict of the jury was given under a mistake on their part;<sup>7</sup> where the successful party, through some fraudulent device or misrepresentation, prevented his adversary from attending at the trial;<sup>8</sup> and where the judge at law was disqualified by reason of interest.<sup>9</sup> In one instance a new trial was granted because the complainant had by some mistake of the clerk of the court failed to give a proper bond, whereby his right of appeal was lost.<sup>10</sup>

In the case *Hoskins v. Hattenback*, 14 Iowa, 314, it appeared that Hattenback sued Hoskins in October, 1859, in

<sup>1</sup> *Deputy v. Tobias*, 1 Blackf. 311; 12 Am. Dec. 243; *Peagram v. King*, 2 Hawks, 605; 11 Am. Dec. 793; *Cox v. Mobile*, 44 Ala. 611; *Harvey v. Seashol*, 4 W. Va. 115; *Barrett v. Floyd*, 3 Call, 531; *Vathier v. Zane*, 6 Gratt. 246; *Cox v. Mobile Railroad*, 44 Ala. 611; *Mellich v. First National Bank*, 52 Iowa, 94; *Wynne v. Newman*, 75 Va. 811; *Bloss v. Hall*, 27 W. Va. 503; *Hone v. Queen*, 4 Neb. 108.  
<sup>2</sup> *Hewlett v. Hewlett*, 4 Edw. Ch. 7; *Gardiner v. Bowling*, 12 Gill & J. 381.  
<sup>3</sup> *Wilkey v. McConnell*, 63 Ill. 238; *Biggins v. Brockman*, 63 Ill. 316; *Gardiner v. Bowling*, 12 Gill & J. 381.  
<sup>4</sup> *Lawless v. Reese*, 3 Bibb, 486; *Cummins v. Kennedy*, 4 J. J. Marsh. 645.  
<sup>5</sup> 1 Chitty's Practice, 457; 3 Graham and Waterman on New Trials, 1531; *Sneed v. Town*, 9 Ark. 535; *Gibbs v. Hooper*, 2 Mylne & K. 353.  
<sup>6</sup> *Joslin v. Coffin*, 5 How. (Miss.) 539.  
<sup>7</sup> *Cochran v. Street*, Wythe, 69; *Rust v. Ware*, 6 Gratt, 50; 52 Am. Dec. 100; *Woods v. Macrae*, Wythe, 78.  
<sup>8</sup> *Land v. Elliott*, 1 Smedes & M. 608; *Chambers v. Handley*, 4 Bibb, 284.  
<sup>9</sup> *Milnor & Co. v. G. R. R. & B. Co.*, 4 Ga. 385.  
<sup>10</sup> *Oliver v. Pray*, 4 Ohio, 175; 19 Am. Dec. 595.



trespass, and recovered judgment for two thousand four hundred dollars. In October, 1860, Hoskins filed a bill for a new trial, in which he averred that the chief issue in the former action was, whether an alleged purchase by Hattenback of certain goods from Henneman and Gambert was fraudulent as against creditors; that he succeeded at the trial in proving a fraudulent purpose on the part of the debtors, but could not show that Hattenback had knowledge of the fraud; that he used every means in his power to obtain evidence of such knowledge; that he discovered one witness who stated that he would swear to facts which would clearly establish such knowledge, but that the witness at the trial surprised complainant by swearing to a different state of facts, and thus leaving him without evidence; that complainant could not discover other evidence in time to move for a new trial; that on September 17, 1860, complainant discovered that one Godfret Hattenback would testify that the plaintiff in the former suit told him, witness, that plaintiff was to get two thousand dollars for his trouble and services; that the debtors, Henneman and Gambert, were to get the balance; that they told said plaintiff at the time of the sale that they were in debt, and wished to sell to prevent their creditors from collecting their demands. A demurrer was interposed to this bill, in the consideration of which the court, by Wright, J., said: "But does the bill show sufficient to authorize a court of equity to grant a new trial? The text-books and cases are full of learning on this subject. Without, however, entering into the discussion, we state such general propositions as are necessary to the determination of the case before us. In *Colyer v. Langford's Adm'r*, 1 A. K. Marsh. 174, it is said that, 'in general, where it is proper for a court of law to grant a new trial, if the application is made while that court has authority to do so, it is equally proper for a court of equity to grant a new trial if the application be made on grounds arising after the court of law had ceased

to have power to do so.' That case was not unlike this, and is sustained by *Deputy v. Tobias*, 1 Blackf. 311; 12 Am. Dec. 243. In *Balance v. Loomis*, 22 Ill. 82, Walker, J., uses this language: 'If it appears that the judgment complained of is unjust, and that the party, in good faith, has used, or attempted to use, all the means given him by law to assert his rights, by active efforts on his part made in good faith, and to the extent that a party has it in his power to use, but has nevertheless been prevented from presenting his defense to the claim, equity should grant a new trial at law.' And see Story's Eq. Jur., sec. 887. In this case, the testimony of the witness referred to could not have been obtained at the trial. It consists of declarations or admissions made by Hattenback long after that time. Of its materiality there can be no room for doubt. As to its effect or weight, of course, it is not for us to speak further than to remark that if the witness shall be credited by the jury, then, according to the averments of the bill, complainant's defense would be complete, and a different verdict would be found."

The language employed in the decisions respecting the granting of new trials in equity, or the compelling of a party to submit to a new trial, is often misleading, in this, that it produces the impression that the verdict and judgment at law are vacated and set aside and the case there taken up and retried. Nothing of the kind occurs. The court of equity, when it grants relief, does not vacate or otherwise disturb the judgment at law, except in so far as it may enjoin a party from enforcing it. If it finds that with respect to some issue presented in the action at law the complainant ought not to be concluded by the judgment in that action, and that such issue ought to be tried anew, it will require the defendant to submit to the retrial thereof. But this retrial does not take place in the original action at law. The chancery court merely orders the issue "to be tried as other issues out of chancery are

tried," and when so tried the result is certified to it for its final action.<sup>1</sup>

To prevent conflicts between courts of equal authority, the rule prevails in some of the states that an action the effect of which is to annul or to prevent the execution of a judgment must be brought in the court in which it was entered,<sup>2</sup> or in some court of powers superior to those of that court. In other words, "that one court cannot control the execution of the orders and process of another court of equal jurisdiction."<sup>3</sup> But this rule is said to apply only when the judgment is valid, and not when relief from it is sought on the ground that it is void for want of service of process on the defendant.<sup>4</sup> As between the national and the state courts, neither will undertake to grant relief from a judgment of the other. One having equitable grounds for relief from a judgment rendered in the courts of either must apply to the courts of the sovereignty in which the judgment was entered.<sup>5</sup>

§ 486. **Grounds of Relief in General.**—In respect to the general grounds upon which the interposition of courts of equity may be successfully invoked to obtain relief from judgments or decrees, there seems to be a perfect unanimity of opinion. The adjudication of any question is always final, unless corrected by some appellate tribunal, and is never subject to re-examination in any other than an appellate court upon any issue of law or of fact, nor upon the sole ground that the former decision is contrary to equity or good conscience. It is always a condition precedent to the proper action of

<sup>1</sup> *Wynne v. Newman*, 75 Va. 811; *v. Seymour*, 71 Wis. 340; *Fenske v. Knifong v. Hendricks*, 2 Gratt. 212; *Kluender*, 61 Wis. 602; 44 Am. Dec. 385.

<sup>2</sup> *Dufossatt v. Berens*, 18 La. Ann. 339; *State v. Judge*, 42 La. Ann. 71; *Jones v. Ahrens*, 116 Ind. 490.

<sup>3</sup> *Plunkett v. Block*, 117 Ind. 18; *Bender v. Damon*, 72 Tex. 92; *Cardinal v. Eau Claire*, 75 Wis. 404; *Coon*

*Arnold v. Hawley*, 67 Iowa, 313; *Bender v. Damon*, 72 Tex. 92.

<sup>4</sup> *McKim v. Brooks*, 7 Cranch, 279; *Riggs v. Johnson Co.*, 6 Wall. 166; *U.S. v. Keokuk*, 6 Wall. 514; *English v. Miller*, 2 Rich. Eq. 320; *Strosier v. Howes*, 30 Ga. 578; 1 U.S. Stat. at Large, 335.

a court of equity in interfering with a judgment or decree not before it upon appeal that facts be disclosed establishing that the matter now in the form of an adjudication is in truth, without any fault of the party seeking to avoid its effect, a determination in which he could not present his cause of action or his grounds of defense, as the case may be, to the consideration of the court, either because the court was not competent to hear it and to grant relief thereupon, or because he was prevented from presenting it or from having it properly considered through fraud, accident, surprise, or some other sufficient cause for the interposition of equity. These principles can be best illustrated and supported by reference to some of the opinions expressed by the highest authorities both in England and in the United States.

"I do agree the court ought to be very tender how they help any defendant after a trial at law in a matter where such defendant had an opportunity to defend himself."<sup>1</sup> According to the opinion of Lord Redesdale, "the inattention of parties in a court of law can scarcely be made the subject of interference in a court of equity. There may be cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law, and therefore equity sometimes interferes; as in cases of complicated accounts, where the party has not made defense because it was impossible for him to do so effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself of something by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using it."<sup>2</sup> "The rule allowing parties to appeal to chancery against a judgment in any court is of great strictness and inflexibility; and it is necessary that it should be so, as otherwise the jurisdiction of that court would soon supplant all other tribunals. A court

<sup>1</sup> By the Master of the Rolls, in *Gainsborough v. Gifford*, 2 P. Wms. 424.

<sup>2</sup> *Bateman v. Willoc*, 1 Schoales & L. 201.

of equity, therefore, will not lend its aid unless the party claiming its assistance can impeach the judgment by facts or on grounds of which he could not have availed himself at law, or was prevented from doing it by fraud or accident or the act of the opposite party, unmixed with negligence or fault on his own part."<sup>1</sup> "When a party has once an opportunity of being heard, and neglects to do so, he must abide the consequences of his neglect. A court of equity cannot relieve him though the judgment is manifestly wrong."<sup>2</sup> "The general rule is, that where there is a defense at law, chancery will not grant relief, unless complainant can show that, owing to particular circumstances not arising from his own neglect or inattention, he has been deprived of the benefit of his defense at law."<sup>3</sup> The general rule is, that relief will not be "granted against a judgment at law on the ground of its being contrary to equity, unless defendant was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or unless he was prevented from availing himself of it by fraud or accident or the act of the opposite party, unmixed with negligence or fraud on his part."<sup>4</sup> A court of equity does not interfere on the ground that injustice has been done,<sup>5</sup> or that a judgment is wrong in law or in fact,<sup>6</sup> or that its enforcement will work a great hardship,<sup>7</sup> unless the party com-

<sup>1</sup> *Watts v. Gayle*, 20 Ala. 817; *Little v. Price*, 1 Md. Ch. 182; *Emerson v. Udall*, 13 Vt. 477; 37 Am. Dec. 604; *Pettes v. Bank of Whitehall*, 17 Vt. 435; *Windwart v. Allen*, 13 Md. 196; *Lafon v. Deessart*, 1 Martin, N. S., 71; *Benton v. Roberts*, 3 Rob. (La.) 224; *Ponder v. Cox*, 26 Ga. 485; *Miller v. Morse*, 23 Mich. 365; *Lester v. Hoskins*, 26 Ark. 63; *Alford v. Moore*, 15 W. Va. 597; *Proctor v. Pettit*, 25 Neb. 96; *Wells v. Wall*, 1 Or. 295; *Hunt v. Coachman*, 6 Rich. Eq. 286; *Long v. Smith*, 39 Tex. 160; *Royce v. Hampton*, 16 Nev. 25.

<sup>2</sup> *York v. Clopton*, 82 Ga. 362.

<sup>3</sup> *Cunningham v. Caldwell, Hardin*, 131.

<sup>4</sup> *Kinney v. Ogden's Adm'r*, 3 N. J. Eq. 168. See also *Taggart v. Wood*, 20 Iowa, 236; *Baxter v. Dear*, 24 Tex. 17; 74 Am. Dec. 89; *Williams v. Lee*, 3 Atk. 223; *Vilas v. Jones*, 1 N. Y. 274; *Lester v. Hoskins*, 26 Ark. 63.

<sup>5</sup> *Pollock v. Gilbert*, 16 Ga. 398; 16 Am. Dec. 732; *Nevins v. McKee*, 61 Tex. 412; *Harn v. Phelps*, 65 Tex. 592; *Holmes v. Steele*, 28 N. J. Eq. 173.

<sup>6</sup> *Braden v. Reitszenberger*, 18 W. Va. 286; *Kelleher v. Boden*, 55 Mich. 295; *Merritt v. Baldwin*, 6 Wis. 286; *Breed v. Ketchum*, 51 Wis. 164.

<sup>7</sup> *Hill v. Rogers*, Rice Eq. 7; *Hamilton v. Adams*, 15 Ala. 596; 50 Am. Dec. 150.

plaining was, without his fault, deprived of his opportunity to present his defense in the original action on the merits. And if in a suit in equity, seeking relief from an action at law, any issue necessary to the maintenance of such suit appears to have been determined on the merits in some other suit or proceeding between the same parties, such determination must be accepted as conclusive in the suit in equity.<sup>1</sup>

While the courts of equity in England and in the several states of this Union have uniformly refused their aid in all cases where their action would involve either the usurpation of appellate jurisdiction or the granting of a second opportunity of presenting a cause upon its merits, they have, on the other hand, uniformly extended their beneficent principles and their varied and efficient means of relief over a large and well-defined class of cases, to the end that no man should retain an unconscientious advantage procured by him in a court of law or of equity through his own fraud or through some excusable mistake or unavoidable accident on the part of his adversary.<sup>2</sup> The jurisdiction of courts of equity "to set aside a decree obtained by fraud, in an original bill filed for that purpose, has long been unquestioned."<sup>3</sup> "Any evidence which clearly proves it to be against conscience to execute a judgment of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence of himself or his agent, will justify an application to chancery."<sup>4</sup> To entitle a party to relief from a judgment or decree, it must be made evident that he had a defense upon the

<sup>1</sup> Phillips v. Pullen, 45 N. J. Eq. 830; Cowan v. Wheeler, 25 Me. 267; 43 Am. Dec. 283; McCampbell v. McCampbell, 5 Litt. 92; 15 Am. Dec. 48; Boston and Worcester R. R. Co. v. Sparhawk, 1 Allen, 448; 79 Am. Dec. 750.

<sup>2</sup> Wagner v. Shank, 59 Md. 313;

Given's Appeal, 121 Pa. St. 260; 6 Am. St. Rep. 795.

<sup>3</sup> Wright v. Miller, 1 Sand. Ch. 103; Whittemore v. Coster, 4 N. J. Eq. 438; 41 Am. Dec. 740.

<sup>4</sup> Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Powers's Ex'rs v. Butler's Adm'rs, 4 N. J. Eq. 465.

merits, and that such defense has been lost to him, without such loss being "attributable to his own *omission, neglect, or default.*"<sup>1</sup> The loss of a defense, to justify a court of equity in removing a judgment, must in all cases be occasioned by the fraud or act of the prevailing party, or by mistake or accident on the part of the losing party, unmixed with any fault of himself or his agent.<sup>2</sup>

§ 487. **Error and Irregularity.**—It has already been intimated that neither an erroneous conclusion upon which a judgment was based, nor any irregularity of proceeding not involving the jurisdiction of the tribunal pronouncing it, can have any effect in determining the question whether the judgment should be set aside or restrained in equity. Such, beyond doubt, is the law.<sup>3</sup> "A court of equity will never set aside or enjoin a judgment on the ground of error or mistake in the judgment of the court of law."<sup>4</sup> Nor will this general rule be varied because the judgment was upon default, unless there was fraud or surprise, or other good reason for the failure to defend;<sup>5</sup> nor on the ground that the supreme court had overlooked or mistaken material facts shown by the record;<sup>6</sup> nor because the court, "through haste and inadvertence," rendered an erroneous decision,<sup>7</sup> or failed to

<sup>1</sup> *Hair v. Lowe*, 19 Ala. 224.

<sup>2</sup> *Wingate v. Haywood*, 40 N. H. 437; *Hibbard v. Eastman*, 47 N. H. 507; 92 Am. Dec. 467; *Mastick v. Thorp*, 29 Cal. 444; *Boston v. Haynes*, 33 Cal. 31.

<sup>3</sup> *Methodist Church v. Mayor of Balt.*, 6 Gill, 391; 48 Am. Dec. 540; *Grantham v. Kennedy*, 91 N. C. 148; *Sanders v. Albritton*, 37 Ala. 716; *Ex parte Christian*, 23 Ark. 641; *Clopton v. Carlos*, 42 Ark. 560; *De Haven v. Covall*, 83 Ind. 344; *Hazeltine v. Reusch*, 51 Mo. 50; *Cutter v. Kline*, 35 N. J. Eq. 534; *Meixell v. Kirkpatrick*, 28 Kan. 315; *McGindley v. Newton*, 75 Mo. 115; *McIndoe v. Hazleton*, 19 Wis. 567; 88 Am. Dec. 701; *Fowler v. Lee*, 10 Gill & J. 358; 32 Am. Dec. 172; *Yarborough v. Thompson*, 3 Smedes & M. 291; 41 Am. Dec. 626.

<sup>4</sup> *Story's Eq.*, sec. 1572; *Paddock v.*

*Palmer*, 19 Vt. 581; *Baker v. Morgan*, 2 Dow, 526; *Shottenkirk v. Wheeler*, 3 Johns. Ch. 279; *Holmes v. Remsen*, 7 Johns. Ch. 286; *Coffin v. McCullough's Adm'r*, 30 Ala. 107; *Ludlow v. Ramsey*, 11 Wall. 581; *Tarver v. Tarver*, 9 Pet. 174; *McDonall v. McDonall*, 1 Bail. Eq. 324; *De Riemer v. De Cantillon*, 4 Johns. Ch. 85; *Stockton v. Briggs*, 5 Jones Eq. 309; *Reynolds v. Horine*, 13 B. Mon. 234; *Dunn v. Fish*, 8 Blackf. 407; *Donovan v. Finn*, Hopk. Ch. 59; 14 Am. Dec. 531; *Drake v. Henshaw*, 47 Iowa, 291; *Barke v. Wheat*, 22 Kan. 722; *Roller v. Woodbridge*, 46 Tex. 485; *Jilsun v. Stebbins*, 41 Wis. 235.

<sup>5</sup> *Turpin v. Thomas*, 2 Hen. & M. 139; 3 Am. Dec. 615.

<sup>6</sup> *Russel v. Slaton*, 38 Ga. 195; *Nicholson v. Patterson*, 6 Humph. 394.

<sup>7</sup> *Dunham v. Downer*, 31 Vt. 249.

appoint a guardian *ad litem* for a minor defendant,<sup>1</sup> or entered judgment against an insane person.<sup>2</sup> If a judgment in an action to foreclose a lien is entered against the defendant personally, as well as against the property, when no personal judgment is prayed for in the complaint, the entry of such judgment, in the absence of any special agreement or understanding between the parties, is not a fraud, and it will not be set aside in equity.<sup>3</sup> Relief cannot be granted because the court erred in admitting or in excluding evidence. There must always be some special ground of relief other than error of law.<sup>4</sup> All errors of decision and of proceeding must be settled in the tribunals in which they originate, or by an appeal to some appellate tribunal; and in no case will a court of equity take upon itself a revisory jurisdiction.<sup>5</sup> Hence where bonds were taken under a certain act of the legislature to regulate the sale of spirituous liquors, and a judgment was rendered upon one of such bonds, and thereafter, in another action, the act was declared unconstitutional, it was held that an injunction should not be granted to restrain the execution of the judgment. The judgment "was founded on the bonds, and not on the act; and of the suit upon them the circuit court had full jurisdiction. The act being void, the bonds are simply unsupported by any valid consideration; and this being the case, the judgment rendered upon these bonds, though it may be deemed erroneous, is not void, and must be held operative until, in accordance with the ordinary rules of procedure, it is reversed by a court of error."<sup>6</sup> As a final judgment or decree cannot be avoided in equity on account of any errors of law entering into it and affecting the merits of the controversy, it could hardly be contended that mere errors in proceeding could have a

<sup>1</sup> *Drake v. Henshaw*, 47 Iowa, 291; 173; *Harrison v. Nettleship*, 2 Mylne & K. 423; *Moore v. Dial*, 3 Stew. 155.

<sup>2</sup> *Woods v. Brown*, 93 Ind. 164; 47 Am. Rep. 369.

<sup>3</sup> *Murdock v. De Vries*, 37 Cal. 527.

<sup>4</sup> *Vaughn v. Johnson*, 9 N. J. Eq.

<sup>5</sup> *Jennison v. Hapgood*, 7 Pick. 1; 19 Am. Dec. 258.

<sup>6</sup> *Cassel v. Scott*, 17 Ind. 514.



greater effect. It is therefore conceded that equity will not interfere with a judgment on account of alleged irregularities occurring in the exercise of lawful jurisdiction.<sup>1</sup>

§ 488. **General Classification of Grounds of Relief.**—The exclusion of error and irregularity from the grounds upon which relief from a judgment or decree may be obtained leaves but one ground available in any case, which is, that the party could not successfully prosecute his claim nor make his defense in the original action, because it was not there available to him as a claim or defense, or if so available, he was, without any fault on his part, prevented from asserting it. The causes by reason of which the party could not successfully prosecute or defend, and which entitle him to the aid of courts of chancery to relieve him from the consequences which would otherwise attend a final adjudication pronounced against him, naturally divide themselves into two great classes. The class which we shall first consider includes all those cases in which a defense or prosecution could not be made on account of the fraud or act of the prevailing party. In the second class are embraced all those cases in which a party is excused from presenting his side of the controversy, although his failure to present it did not arise from the act or fault of his adversary.

§ 489. **Fraud.**—Chief among the cases belonging to the first-named class are those in which the judgment or decree was obtained by fraud. It must be borne in mind that it is not fraud in the cause of action, but fraud in its management, which entitles a party to relief. The fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. If the cause of action is vitiated by fraud, this is a defense which must be interposed, and unless its interposition is prevented by fraud, it cannot be asserted against

<sup>1</sup> *Blank v. Speckman*, 23 La. Ann. 146; *McIndoe v. Hazleton*, 19 Wis. 567; 88 Am. Dec. 701; *Stiles v. Knapp*, 2 Ga. Dec. 36; *Boyd v. Chesapeake*, 17 Md. 195; 79 Am. Dec. 646; *Gardner v. Jenkins*, 14 Md. 58.

the judgment;<sup>1</sup> "for judgments are impeachable for those frauds only which are *extrinsic* to the merits of the case, and by which the court has been imposed upon or misled into a false judgment. They are not impeachable for frauds relating to the merits between the parties. All mistakes and errors must be corrected from within by motion for a new trial, or to reopen the judgment, or by appeal."<sup>2</sup>

It is a general rule, too familiar to require any citation of authorities in its support, that "a judgment, either of a legal or of an equitable tribunal, may be, in effect, vacated by a court of equity, if it was obtained by fraud."<sup>3</sup> A few cases will be noticed as illustrating the application of this rule. If a confession of judgment is made by virtue of a letter of attorney fraudulently obtained, both the judgment and the letter of attorney will be annulled.<sup>4</sup> Suit was commenced against several defendants. The summons being returned, as to one defendant, "Executed by leaving a copy," the plaintiff's attorney erased all the return, except the word "executed," and thereby obtained a judgment. Writ of error was sued out, but the judgment was affirmed by the appellate court. Afterward the original judgment was set aside at chancery on the ground of fraud, not apparent on the face of the record,

<sup>1</sup> *Muscatine v. Missouri R. R. Co.*, 1 Dill. 536; *Payne v. O'Shea*, 84 Mo. 129; *Watts v. Fraser*, 80 Ala. 186; *Zellerbach v. Allenberg*, 67 Cal. 296; *Griffith v. Reynolds*, 4 Gratt. 46.

<sup>2</sup> *Amador etc. Co. v. Mitchell*, 59 Cal. 179.

<sup>3</sup> *Young v. Tucker*, 39 Iowa, 600; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Hogg v. Link*, 90 Ind. 346; *Lockwood v. Mitchell*, 19 Ohio, 448; 53 Am. Dec. 438; *Ward v. Quinlivan*, 57 Mo. 425; *Munn v. Worrall*, 16 Barb. 221; *Cornwithe v. Griffin*, 21 Barb. 9; *Burch v. Scott*, 1 Bland, 112; *Brown v. Thornton*, 47 Ga. 474; *Ogden v. Larrabee*, 57 Ill. 389; *Cowin v. Toole*, 31 Iowa, 513; *Hayden v. Hayden*, 46 Cal. 332; *Carrington v. Holabird*, 17 Conn. 530; *Greene v. Haskell*, 5 R. I. 447; *Kent v. Ricards*, 3 Md. Ch. 392; *Hahn v.*

*Hart*, 12 B. Mon. 426; *Orank v. Flowera*, 4 Heisk. 629; *Binasse v. Barker*, 13 N. J. L. 256; 23 Am. Dec. 720; *Poin-dexter v. Waddy*, 6 Munf. 418; 8 Am. Dec. 749; *Dugan v. McGann*, 60 Ga. 353; *Whittlesey v. Delaney*, 73 N. Y. 571; *Bresnehan v. Price*, 57 Mo. 422.

"It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of court, a court of equity will disregard them all if necessary, that justice and equity may prevail": *Warner v. Blakeman*, 4 Keyes, 507.

<sup>4</sup> *Johnston v. Loop*, 2 Tex. 331.

in relation to the service of process, and which could not therefore be asserted against the judgment on appeal.<sup>1</sup> A judgment was obtained by attachment, during defendant's absence, for a sum claimed to be due for the board of his wife. Relief was obtained by the defendant, upon showing that it was the duty of plaintiff, under an agreement, to furnish such board, and that he, at the time the suit was commenced, had funds of defendant in his hands, on the ground that otherwise a party having no opportunity for defense would be subjected to a gross wrong and fraud.<sup>2</sup> A plaintiff filed a complaint against his wife, praying for a divorce on the ground of desertion. He obtained an order for the service of summons by publication by alleging that he did not know the place of her residence. Judgment by default was afterward entered, based upon such service. The wife instituted proceedings to set aside the decree, alleging that the separation was voluntary and in pursuance of written articles; that the plaintiff well knew where she resided; that no copy of summons or complaint was ever served on her personally, nor by depositing a copy thereof in the post-office, directed to her; and that she had no knowledge of the suit until long after the decree was entered. A demurrer being interposed, the court held that the allegations of the wife showed such a fraud *upon her* and upon the court in the divorce case for the purpose of avoiding a contest upon the merits as authorized the setting aside of the decree.<sup>3</sup> Decrees of divorce may, when obtained by fraud, be vacated in the same manner and under the same circumstances which would warrant the vacation of any other decree,<sup>4</sup> although the party who obtained the fraudulent judgment has contracted another marriage.<sup>5</sup> A decree

<sup>1</sup> Wilson v. Montgomery, 14 Smedes & M. 205.

<sup>2</sup> Moore v. Gamble, 9 N. J. Eq. 246.

<sup>3</sup> Johnson v. Coleman, 23 Wis. 452; 99 Am. Dec. 193.

<sup>4</sup> Adams v. Adams, 51 N. H. 388; 12 Am. Rep. 134; Edson v. Edson, 106 Mass. 590; 11 Am. Rep. 393; True v.

True, 6 Minn. 458; Boyd's Appeal, 38 Pa. St. 241; Bradford v. Abend, 89 Ill. 78; 31 Am. Rep. 67. *Contra*, Parish v. Parish, 9 Ohio St. 534; 75 Am. Dec. 482.

<sup>5</sup> Whitcomb v. Whitcomb, 46 Iowa, 437; Rush v. Rush, 46 Iowa, 648; 26 Am. Rep. 179.

against an administrator founded upon a bond will be set aside for fraud, if it appears that the court was deceived by plaintiff's tearing off from the bond a paper annexed thereto showing credits which ought to have been applied to the bond, as the administrator is not presumed to be cognizant of the transactions of his testator.<sup>1</sup> Equity will not relieve a party from a judgment procured by his own fraud.<sup>2</sup> If the defendant in an action has been discharged by a decree in bankruptcy, and is prevented from availing himself of this discharge by any trick, fraud, or device of the plaintiff, equity will grant him relief.<sup>3</sup> Collusion, being one of the forms in which fraudulent designs are frequently pursued, is as objectionable as any other form of fraud, and vitiates all judgments into which it enters, and the person against whom it is employed may find relief in equity.<sup>4</sup> Fraud by which an attorney was prevented from making a defense, or induced to prove recreant to his client, entitles the latter to relief.<sup>5</sup>

The procuring of a judgment by perjury, or subornation of perjury, is doubtless a fraud, and such a fraud as would induce equity to grant relief, were it not for the fact that its existence can rarely or never be ascertained otherwise than by trying anew an issue already tried in the former action. Whenever an issue exists in any action or proceeding, each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counter-proofs. Where he has an opportunity to do this, and does not avail himself of it, or though availing himself of it, is unable to overcome the effect upon the court or jury of the evidence offered by his adversary, he cannot, in effect, obtain a retrial of the issue before

<sup>1</sup> *Carnel v. Wilson*, 3 Litt. 80.

<sup>4</sup> *Hardy v. Broadbua*, 35 Tex.

<sup>2</sup> *Blystone v. Blystone*, 51 Pa. St. 668; *Mayberry v. McClurg*, 51 Mo. 373; *Wells v. Smith*, 13 Gray, 207; 74

256.

Am. Dec. 631.

<sup>5</sup> *Haverty v. Haverty*, 35 Kan. 438;

<sup>3</sup> *Starr v. Heckart*, 32 Md. 267; *Beck v. Bellamy*, 93 N. C. 129; *De Greenleaf v. Maher*, 2 Wash. C. C. 44; *Louis v. Meek*, 2 G. Greene, 55; 50 *Manwarring v. Kouns*, 35 Tex. 174; Am. Dec. 491.

*Park v. Casey*, 35 Tex. 536.

another tribunal by charging that the judgment against him was procured by perjury;<sup>1</sup> and this has been held to continue to be the rule, notwithstanding the existence of a statute authorizing actions to set aside judgments obtained by means of perjury or subornation of perjury.<sup>2</sup>

§ 490. **Fraudulent Alteration.** — If a judgment properly obtained is afterward fraudulently altered so as to include a person not served with process, and not originally named in the judgment, equity has jurisdiction to vacate it.<sup>3</sup> "Fraud is one of the heads of original and undoubted equity jurisdiction; and to alter and change the record of a judgment by increasing the sum for which it was rendered, without authority or consent, is a gross and palpable fraud, although it may also be a crime." An injunction will therefore be issued to restrain the collection of a judgment so altered.<sup>4</sup>

§ 491. **Fraudulent Concealment.** — The concealment of facts which if known at the trial would have prevented the recovery is always good ground for coming into equity to obtain relief from a judgment at law.<sup>5</sup> Thus if an administrator suppresses the receipt of a sum of money obtained by him for the benefit of the estate, and thereby causes his accounts to be closed without his being charged with that sum, they will be reopened in equity on the ground of fraud, although the statute declares the decree of accounting final and conclusive.<sup>6</sup> A judgment recovered by a vendor for an amount due as purchase-money of lands will be enjoined in equity if it can be shown that after the recovery the defendant discovered that the vendor had conveyed the land to his children previously to conveying to the defendant, the defendant's

<sup>1</sup> *Ross v. Wood*, 70 N. Y. 8; *Smith v. Loary*, 1 Johns. Ch. 320; *Cotzhausen v. Kerting*, 29 Fed. Rep. 821; *Greene v. Greene*, 2 Gray, 361; 61 Am. Dec. 454; *Peck v. Woodbridge*, 3 Day, 30; *Folsom v. Folsom*, 55 N. H. 78; *ante*, sec. 289.

<sup>2</sup> *Hass v. Billings*, 42 Minn. 63.

<sup>3</sup> *Chester v. Miller*, 13 Cal. 558.

<sup>4</sup> *Babcock v. McCamant*, 53 Ill. 214.

<sup>5</sup> *Fish v. Lane*, 2 Hayw. (N. C.) 522;

*Noyes v. Loeb*, 24 La. Ann. 48.

<sup>6</sup> *Pratt v. Northam*, 5 Mason, 95.

deed containing covenants of warranty, and the plaintiff's estate being insolvent. A wife against whom a judgment in ejectment has been entered is entitled to relief therefrom in equity upon showing that it was based upon a deed made by the trustee of her estate, as she supposed, to secure advances for the use of such estate, when, as she had discovered after judgment, no moneys were advanced or paid to her trustee or for the use of the estate, and that the amount for which the trust deed was given was made up of a debt due from her husband and of other moneys paid to and used by him, and the judgment against her was procured by the combination and confederation of her husband and the person to whom the trust deed was made.<sup>1</sup> A bill was filed to set aside a judgment recovered upon a policy of insurance, in which it was charged that the ship insured was lost by the boring of holes in her bottom, and by fraudulently casting her away; that such fraud was unknown when the judgment was rendered, and was fraudulently concealed by the plaintiffs in the former suit. Upon demurrer, it was decided that these charges, if sustained, would entitle complainant to the relief demanded, because a perfect and valid defense at law has been made unavailable by the fraudulent concealment of the plaintiffs and the total and excusable ignorance of the defendants.<sup>2</sup> H. sued R.; S., who was liable with R., was put on the stand as a witness, but just before becoming a witness, he, without knowledge of R., paid H. the amount claimed. Judgment was rendered against R. before he knew of the payment made by S. H. afterward endeavoring to collect his judgment, R. set up these facts, and prayed for an injunction. To oppose the issuing of the injunction, H. insisted that the fact of payment ought to have been disclosed as a defense prior to the judgment. But the court held that "R. was not bound to present to a court of law a fact of which he

<sup>1</sup> *Capital Bank v. Rutherford*, 70 Ga. 57.

<sup>2</sup> *Ocean Ins. Co. v. Fields*, 2 Story, 59.

knew nothing, and of which he had no cause to suspect anything, and to which he was in no manner privy."<sup>1</sup>

§ 492. **Taking Judgment against Agreement.**—It has frequently happened that one of the parties litigant has failed to present his claim or defense because he relied upon some agreement or understanding between himself and his adversary which, if observed, rendered such presentation unnecessary. And with more than occasional frequency, if we may judge from the reports, these agreements have been designed to lull a party into security and inactivity in order that some unconscionable advantage could be taken of him. In all such cases, courts of equity, when asked to do so, have invariably restored the injured party to his rights under the agreement, and have wrested from his opponent all those fruits he had hoped to harvest and enjoy through fraud and duplicity.<sup>2</sup> "The cases are full and explicit upon the point; a judgment obtained in violation of an agreement of compromise, and by which an appearance is prevented, will not be allowed to stand."<sup>3</sup> An action was commenced against A and others. A having a good defense, the plaintiff agreed to dismiss as to him, and on that account A failed to defend. The judgment taken in violation of this agreement was set aside and the execution restrained.<sup>4</sup> Similar action was taken where the defendant was assured that he was sued *pro forma*, because he was supposed to be a necessary party, and that no judgment would be taken against him; and a decree was nevertheless taken against defendant;<sup>5</sup> and so when, after the commencement of a suit, an accord and satisfaction had taken place between the parties, and upon that account the defendant failed

<sup>1</sup> Reed v. Harvey, 23 Ark. 44.

<sup>2</sup> Holland v. Trotter, 22 Gratt. 136; Chambers v. Robbins, 28 Conn. 552; Kent v. Ricards, 3 Md. Ch. 392; Neuman v. Meek, Smedes & M. Ch. 331; California B. S. Co. v. Porter, 68 Cal. 369; Murphy v. Smith, 86 Mo. 333; Keeler v. Elston, 22 Neb. 310; Baker

v. Redd, 44 Iowa, 179; Dandridge v. Harris, 1 Wash. (Va.) 326; 1 Am. Dec. 465.

<sup>3</sup> Neal's Adm'r v. Dicka, 72 Ind. 374.

<sup>4</sup> Johnson v. Unversaw, 30 Ind. 435; Stone v. Lewman, 28 Ind. 97.

<sup>5</sup> Broadbuss v. Broadbuss, 3 Dana, 536.

to appear and plead;<sup>1</sup> or where the plaintiff, after an interview with defendant, admitted that he had been paid, and promised to go at once and dismiss the action, and assured defendant that he need not employ an attorney or pay any further attention to the action;<sup>2</sup> or took judgment contrary to a stipulation on file purporting to dismiss the action;<sup>3</sup> or agreed that if defendants would withdraw an equitable plea, he would do the equity set up in the plea;<sup>4</sup> or had accepted a certain sum as a satisfaction of his demand and given a receipt in full.<sup>5</sup> The principle that taking judgment in opposition to an agreement or representation of a party or his attorney is such a fraud that the parties will be restored to their former position is applicable whenever the defendant, on account of the agreement, fails to answer, or after answering fails to attend the trial;<sup>6</sup> or when the person against whom the recovery has been had was a garnishee, who, being summoned, had answered, showing that he had no funds of the defendant in his hands, and had thereupon been assured that no further proceedings had been taken against him.<sup>7</sup> Where A was sued upon a note and mortgage, and the plaintiff for a valuable consideration released him from personal liability, but took judgment in violation of his contract, and issued execution thereon, such execution was restrained on the ground that "it was against conscience for the mortgagee to retain his advantage."<sup>8</sup> It makes no difference that the agreement is void because made on Sunday, or was oral, when the rules of the court required all stipulations to be in writing. If it can be shown that it was successfully employed to prevent the defendant

<sup>1</sup> *Jarman v. Saunders*, 64 N. C. 367.

<sup>2</sup> *Keeler v. Elston*, 22 Neb. 310.

<sup>3</sup> *McLeran v. McNamara*, 55 Cal. 508.

<sup>4</sup> *Markham v. Angier*, 57 Ga. 43.

<sup>5</sup> *Gates v. Steele*, 58 Conn. 316; 18 Am. St. Rep. 268. But in another case a party was held guilty of laches under very similar circumstances: *Norman v. Burns*, 67 Ala. 248.

<sup>6</sup> *Dobson v. Pearce*, 1 Abb. Pr. 97;

*Rogers v. Gwinn*, 21 Iowa, 58; *Dobson v. Pearce*, 12 N. Y. 165; 62 Am. Dec. 152; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 2 Gilm. 385; *Edmonson v. Moseby's Heirs*, 4 J. J. Marsh. 497.

<sup>7</sup> *Pelham v. Moreland*, 11 Ark. 442.

<sup>8</sup> *Hibbard v. Eastman*, 47 N. H. 507; 93 Am. Dec. 467.



from making his defense, then the plaintiff will not be allowed to retain the advantage it has secured him.<sup>1</sup> A judgment will be annulled for fraud if it was procured by prevailing on a justice of the peace to take up a case in the absence of a defendant to whom the justice had announced in the morning that he was sick and could not try the cause, and who would have been present at the hour of trial but for such announcement, the plaintiff being present when the defendant left the court, and afterwards returning and inducing the justice to proceed with the case.<sup>2</sup> In this instance, while the prevailing party had not personally made those statements which induced the defendant to forego presenting his defense at the appointed time, he had adopted statements made by another and employed them for an unconscionable purpose, and had thus brought himself fairly within the rule that no one shall retain an advantage at law secured by his own fraud and misrepresentation. But relief was granted in an early case in Virginia which seems altogether unjustifiable, because it sanctions the restraining of a judgment on account of a misrepresentation to which the plaintiff was neither directly nor indirectly a party. Three persons were sued as copartners. One of them, who in fact was not a partner with the others, neglected to defend because he was assured by his co-defendants that the matter would be adjusted. An injunction was granted and the parties placed in their original position.<sup>3</sup>

§ 493. **Procured by Concealment.**—The concealment of material facts is looked upon with such abhorrence, if employed to obtain an unjust judgment, that relief has been granted from judgments so obtained when any considerable degree of diligence would have revealed to the losing party and have enabled him to present to the court the evidence for want of which he was defeated at the

<sup>1</sup> *Blakesley v. Johnson*, 13 Wia. 530.

<sup>2</sup> *Miles v. Jones*, 28 Mo. 87.

<sup>3</sup> *Lee v. Baird*, 4 Hen. & M. 453.

trial. Thus a plaintiff, knowing a judgment to be satisfied, brought an action as a judgment creditor for the purpose of setting aside a conveyance as being made in fraud of his rights. After he had obtained his decree, the defendants discovered that while no satisfaction was marked upon the docket, yet one was filed among the papers in the case anterior to the commencement of the suit against them. They then instituted proceedings to set aside the decree annulling their conveyance, and obtained the relief sought, on the ground that by examining the docket where the *entry of satisfaction ought to be made*, they had used sufficient diligence to entitle them to protection from one asserting a claim known to him to be fully paid.<sup>1</sup> But, as a general rule, no party can be relieved on the ground of any fraudulent practice or concealment on the part of his adversary, unless he on his part exhausted all proper diligence to defend the original action. This is particularly the case where some fraudulent device is employed by his adversary in the management of his case or in adducing the testimony of perjured witnesses. Upon discovering any such fraud, the party against whom it is employed must at once use all the means in his power to countervail it. He cannot either neglect or refuse to employ the means in his power to obtain a proper determination of the action in opposition to the fraud practiced upon him, and then if through his supineness the fraudulent device proves successful, resort to a court of equity and obtain relief.<sup>2</sup>

§ 494. **Personal Threats.**—An allegation in a complaint to obtain relief from a judgment or decree stating that the defendant did not make his defense because prevented by threats of personal violence from attending at the trial, is wanting in the averments essential to authorize the intervention of a court of equity. It fails to show that the plaintiff was in any manner responsible for those

<sup>1</sup> *Shinkle v. Letcher*, 47 Ill. 216.

<sup>2</sup> *Riddle v. Baker*, 13 Cal. 295.

threats, or that the case could not be efficiently managed by an agent or attorney in the absence of the defendant.<sup>1</sup>

§ 495. **Want of Notice.**—We shall now consider the circumstances in which a defendant may be relieved from a judgment or decree rendered in an action wherein his failure to defend is not chargeable to the plaintiff. Prominent among the grounds of relief belonging within this class of cases is the one that the court has proceeded to condemn a party without first giving him an opportunity to be heard. A judgment pronounced without service of process, actual or constructive, and without the defendant's knowing that a court has been asked to adjudicate upon his rights, is regarded with such disfavor at law that a variety of motions, writs, and proceedings are there provided to overthrow it; and in many courts it is at all times and upon all occasions liable to be entirely disregarded upon having its jurisdictional infirmity exposed. But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues, after full opportunity has been given to those who seek to sustain as well as to those who seek to avoid the judgment. If at such trial it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains.<sup>2</sup> Thus

<sup>1</sup> *Powell v. Cyfers*, 1 Heisk. 526. *Finch*, 6 Col. 214; *Robinson v. Reid's Ex'r*, 50 Ala. 69; *Weaver v. Poyer*, 79 Ill. 417; *Armstrong v. Cheshire*, 2 Dev. Eq. 234; 34 Am. Dec. 273; *Glass v. Smith*, 66 Tex. 543; *Smith v. De Weese*, 41 Tex. 595; *Cooke v. Barnham*, 32 Tex. 129; *Crafts v. Dexter*, 8 Ala. 767; 42 Am. Dec. 666; *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216; *Caruthers v. Hartsfield*, 3 Yerg. 366; 24 Am. Dec. 580; *Hickey v. Stone*, 60 Ill. 453; *Rice v. Tobias*, 89 Ala. 214.

<sup>2</sup> *Ingle v. McCurry*, 1 Heisk. 26; *Stubbs v. Leavitt*, 30 Ala. 352; *Jeffery v. Fitch*, 46 Conn. 601; *Ryan v. Boyd*, 83 Ark. 778; *Martin v. Parsons*, 49 Cal. 95; *Williams v. Williams*, 57 Ind. 500; *Wilson v. Hawthorne*, 14 Col. 530; 20 Am. St. Rep. 290; *Duncan v. Jerdine*, 59 Miss. 550; *Crawford v. Redus*, 64 Miss. 700; *Sivley v. Summers*, 57 Miss. 712; *Arnold v. Hawley*, 67 Iowa, 313; *State Ins. Co. v. Waterhouse*, 78 Iowa, 674; *San Juan Co. v.*

an order of sale of land granted upon the petition of an administrator, without service of process upon infant heirs who have no general guardian, will be set aside upon making application in equity.<sup>1</sup> If the record does not disclose the jurisdictional defect, an affirmance of the judgment in an appellate court does not divest equity of the authority to grant relief. "The affirmance of a void judgment on grounds not touching but overlooking its invalidity does not make it valid."<sup>2</sup> The fact that the record contains recitals showing that jurisdiction has been obtained by the service of process does not prevent the granting of relief in equity, though it can only be granted upon showing that such recital is untrue.<sup>3</sup> In fact, such recital may properly be regarded as giving the complainant additional ground for relief in equity, because it shows that the judgment is not void in the extreme sense, and that to obtain relief therefrom by any proceeding at law is extremely difficult, if not impossible. The only cases in which there can be any reasonable doubt about granting relief in equity for want of jurisdiction are those in which such want either appears on the face of the record or may at all times be shown in any and every collateral proceeding. In such cases there are courts in which the remedy at law is deemed adequate, and relief in equity is denied for that reason.<sup>4</sup>

Whether there is any essential difference in a suit in equity between disproving a recital or rebutting a presumption of jurisdiction, and contradicting the direct evidence of the service of process found in the record, is a question upon which, unfortunately, there is still doubt. When the proof of service is found in an affidavit made

<sup>1</sup> *Tyler v. Walker*, 1 Heisk. 734.

<sup>2</sup> *Wilson v. Montgomery*, 14 Smedes & M. 205.

<sup>3</sup> *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556; 73 Am. Dec. 688; *Newcomb v. Dewey*, 27 Iowa, 381; *Bell v. Williams*, 1 Head, 228; *Stone v. Skerry*, 31 Iowa, 582; *Ridgeway v. Bank of Tennessee*, 11 Humph. 525;

*Owens v. Ranstead*, 22 Ill. 161; *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193.

<sup>4</sup> *Orandall v. Bacon*, 20 Wis. 639; 91 Am. Dec. 451; *Murphree v. Bishop*, 79 Ala. 404; *Sanchez v. Carriaga*, 31 Cal. 170; *St. Louis etc. R'y Co.*, 89 Mo. 146; *Lockridge v. Lyon*, 68 Ga. 137; *post*, sec. 497.

by a private person competent to make it, there is, so far as we are aware, no question but it may be contradicted.<sup>1</sup> But such proof may be the return of an officer authorized and required by law to serve process and make return to the court showing that he has done so, and against whom any party injured may maintain an action for a false return, and it may be held either that this remedy is exclusive or at least that no relief will be granted in equity unless it is shown to be inadequate. The national courts have steadily maintained that relief could not be had in equity by showing that a return of process was false, unless it was procured to be made by the plaintiff with knowledge of its falsity. Thus in an action to enjoin a judgment wherein it was proved that no process was served and that the return was false, the court said: "The respondents did no act that can connect them with the false return. It was the sole act of the marshal, through his deputy, for which he was responsible to the complainant for any damages that were sustained by him in consequence of the false return. This is free from controversy; still, the marshal's responsibility does not settle the question made by the bill, which is, in general terms, whether a court of equity has jurisdiction to regulate proceedings, and to afford relief at law, where there has been an abuse in the various details arising out of execution of process, original, mesne, and final. If a court of chancery can be called on to correct one abuse, so it may be to correct another, and, in effect, to vacate judgments where the tribunal rendering the same would refuse relief, either on motion or on a proceeding by *audita querela*, where this mode of redress is in use. In cases of false returns affecting a defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there, the party injured must seek his remedy against the marshal."<sup>2</sup> These

<sup>1</sup> Lapham v. Campbell, 61 Cal. 296.

<sup>2</sup> Walker v. Robins, 14 How. 584.

views have been recently reaffirmed in the same court,<sup>1</sup> and have been accepted and enforced in several of the state courts.<sup>2</sup> But the obvious and conclusive answer to this line of argument is thus briefly stated in the opinion of the supreme court of Tennessee: "The action for a false return is an inadequate remedy for such an injury; for it might be that after a *ruinous sacrifice* suffered in the payment of a judgment so recovered, and the delay and expense of litigation with the officer who made the false return, he might be unable to make the proper indemnity, or succeed in evading his liability."<sup>3</sup> Besides the improbability of the party who is compelled to pay a judgment being able to secure indemnity from an officer making a false return, not only for the amount paid, but for the loss occasioned by having to sacrifice his estate in order to make an immediate and compulsory payment, and the consequent inadequacy of any remedy at law, where the judgment is for a sum of money, there are many other cases involving the possession of or title to real or personal property in which, conceding the liability of the officer making the false return, no adequate remedy can exist except that of restoring the parties to their position before judgment and permitting a defense upon the merits. Hence, in our judgment, the better rule is, that an officer's return does not constitute an insuperable obstacle to granting relief, even though the plaintiff did not procure such return to be falsely made nor have any notice of its falsity.<sup>4</sup> Whether this be true or not, if it be shown that the false return was procured by collusion between the plaintiff and the officer making it, relief may be granted.<sup>5</sup>

With respect to an officer's return, there is said to be a substantial difference between his "recital of matters pre-

<sup>1</sup> *Knox County v. Harehman*, 133 U. S. 152.

<sup>2</sup> *Johnson v. Jones*, 2 Neb. 133; *Taylor v. Lewis*, 2 J. J. Marsh. 400; 19 Am. Dec. 135; *Thomas v. Ireland*, 88 Ky. 581; 21 Am. St. Rep. 356; *Krug v. Davis*, 85 Ind. 309.

<sup>3</sup> *Ridgeway v. Bank of Tenn.*, 11 Humph. 523.

<sup>4</sup> *Ryan v. Boyd*, 33 Ark. 778; *State v. Hill*, 50 Ark. 458; *Hauswirth v. Sullivan*, 6 Mont. 203; *Dunklin v. Wilson*, 64 Ala. 162.

<sup>5</sup> *Hamblen v. Knight*, 60 Tex. 36.

sumptively within his personal knowledge and the recitals of matters not presumptively within such knowledge." For this reason it was held that a return showing that a copy of process was left at the residence of defendant might be contradicted by showing that the place where it was left was not his residence;<sup>1</sup> and when the defendant was a corporation, and summons was served on a person designated, who was stated to be one of its officers, that relief might be had by showing that the person named was not an officer of the defendant, as stated in the return, and did not occupy any relation towards defendant authorizing process against it to be served upon him.<sup>2</sup> Want of actual notice of a proceeding and the failure to personally serve process constitute no ground of relief in equity, when the court was authorized by law to proceed as it did in the absence of such notice and service.<sup>3</sup>

§ 496. **Judgments against Privileged Persons.**—When process is served the defendant must appear and protect his interests. If he is privileged from service as a member of a legislative or other political body, the privilege is a personal one, which must be claimed by motion in the case. Courts cannot, *ex officio*, take notice of the persons thus privileged. And if, in the absence of any claim being interposed, judgment is pronounced against them, it will not be intermeddled with in equity.<sup>4</sup>

§ 496 a. **Relief to Prevent Party from Taking Advantage** of his own neglect, wrong, or mistake may be granted. Thus where A sued to quiet title, and it appeared that he claimed under a tax judgment and sale, and that he was a court commissioner charged by law with the duty of examining whether process in the tax

<sup>1</sup> Bond v. Wilson, 8 Kan. 228; 12 Am. Rep. 466; Mastin v. Gray, 19 Kan. 458; 27 Am. Rep. 149; Walker v. Lutz, 14 Neb. 274.

<sup>2</sup> Rahm v. King W. I. B. Mfy., 16 Kan. 277; Great W. M. Co. v. Min. Co., 12 Col. 46; 13 Am. St. Rep. 204.

<sup>3</sup> Daly v. Pennie, 86 Cal. 552; 21 Am. St. Rep. 61.

<sup>4</sup> Peters v. League, 13 Md. 58; 71 Am. Dec. 622; Prentiss v. Commonwealth, 5 Rand. 697; 16 Am. Dec. 782, and note.

case had been properly served, and that such process had not in fact been served, the court enjoined him from enforcing his tax title. "It is immaterial," said the court, "that he acted, as the court finds, in good faith, and without any fraudulent intent. . . . He has, through his own laches or neglect, obtained an unconscionable advantage over the defendants, against which a court of equity will afford relief. It was through his fault that the decree was obtained without any service of process, and it would be against good conscience to allow him to profit by his own wrong."<sup>1</sup>

§ 497. **While there is Remedy at Law.**—The authorities do not agree upon the question whether equity will interfere with a judgment on the ground of want of jurisdiction over the defendant, while he has it in his power to employ some efficient remedy in the original case. In Kentucky, "though an original judgment be void and be capable of being reversed on appeal, yet the circuit court has power, in an action for that purpose, to enjoin it, and to vacate proceedings under it."<sup>2</sup> In Wisconsin, the fact that the judgment might be set aside, upon motion, for want of jurisdiction is no objection to a proceeding in equity, because such proceeding "is, beyond doubt, as a remedy, equally appropriate both for an investigation of the issues involved and the awarding of appropriate relief as a motion."<sup>3</sup> Similar rules prevail in Iowa,<sup>4</sup> Tennessee,<sup>5</sup> and Louisiana;<sup>6</sup> but in California equity will not interpose while the statutory remedy by motion exists;<sup>7</sup> and in some of the other states courts of equity have declined to interfere where an adequate remedy existed at law.<sup>8</sup> Thus where jurisdiction was based upon service

<sup>1</sup> *Martin v. Parsons*, 50 Cal. 501; 49 Cal. 94.

<sup>2</sup> *Landrum v. Farmer*, 7 Bush, 46.

<sup>3</sup> *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193.

<sup>4</sup> *Connell v. Stelson*, 33 Iowa, 147.

<sup>5</sup> *Caruthers v. Hartafield*, 3 Yerg. 366; 24 Am. Dec. 580.

<sup>6</sup> *Hernandez v. James*, 23 La. Ann. 484.

<sup>7</sup> *Bibend v. Kreutz*, 20 Cal. 109; *Sanchez v. Carriaga*, 31 Cal. 171; *Logan v. Hillegas*, 16 Cal. 201.

<sup>8</sup> *Crandall v. Bacon*, 20 Wis. 639; 91 Am. Dec. 451; *Hart v. Lazaron*, 46 Ga. 396.



of process procured by fraudulently procuring defendant to come within the state, it was held that his only remedy was by motion in the original action to set aside such service.<sup>1</sup> A like decision was made when the judgment was based upon the appearance of defendant entered by an attorney without authority, and no reason was shown for not seeking redress in the original action.<sup>2</sup> Generally, when a party seeking relief from a judgment has an adequate remedy at law by some motion in the original case, equity will not interpose in his favor while that remedy is available, nor even after it has ceased to be available, if he does not show a sufficient excuse for not having resorted to it at the proper time.<sup>3</sup> Hence if after judgment something occurs rendering its enforcement in whole or in part no longer proper, as where it has been wholly or partially paid,<sup>4</sup> or its enforcement is barred by lapse of time,<sup>5</sup> the remedy of the defendant is by motion.

§ 498. **Merits—Whether must be Shown.**—The ground upon which relief in equity against a judgment is commonly justified is, that the complainant had a cause of action or of defense, of the benefit of which he was deprived in the original action, under circumstances which make it inequitable for the prevailing party to enforce the judgment; and if this is the only ground upon which the claim to relief can rest, it must be denied, unless the complainant shows he had some cause of action or of defense, or at least, had there been a fair trial, that the judgment would probably have been more favorable to him.

<sup>1</sup> Buckley v. Heelbruner, 7 Ind. 489; Grass v. Hess, 37 Ind. 193; Marsh's Adm'r v. Best, 41 Mo. 493.

<sup>2</sup> Vilas v. Plattsburgh etc. R'y Co., 123 N. Y. 440; 20 Am. St. Rep. 771.

<sup>3</sup> Reagan v. Fitzgerald, 75 N. Y. 230; Hentzler v. Sumbargo, 54 Iowa, 607; McIndoe v. Hazelton, 19 Miss. 567; 88 Am. Dec. 701; Flannehen v. Wright, 67 Miss. 217; Morris v. Mor-

ris, 76 Ga. 733; Galveston etc. R'y Co. v. Ware, 74 Tex. 47; Syme v. Trice, 96 N. C. 243.

<sup>4</sup> Devoll v. Scales, 49 Me. 320; Morrison v. Spear, 10 Gratt. 228; McRae v. Davis, 5 Jones Eq. 140; Ferrine v. Carlisle, 19 Ala. 688. But in Bowen v. Clark, 46 Ind. 405, a judgment was enjoined because of its payment.

<sup>5</sup> Coward v. Chastain, 90 N. C. 443; 6 Am. St. Rep. 533.

If in the original action jurisdiction was obtained over the defendant by service of process upon him, so that the court had the right to enter judgment therein, we apprehend that there is no doubt that relief cannot be obtained on account of fraud, accident, surprise, or any other ground, except upon showing that the judgment as entered is unjust.<sup>1</sup> If, on the other hand, process has not been served upon the defendant, the court has no power to consider whether he has a defense or not, no right to condemn him unheard; and though a defendant owes a debt he may suffer serious injury in having judgment entered thereon without warning, whereby he may be subjected to unnecessary costs and expenses, and deprived of all opportunity to make provision for payment before his property is liable to be seized and sold. The failure to serve process may leave the defendant in ignorance of subsequent proceedings as well as of the entry of the judgment, and his first knowledge may be brought to him through a claim that he has lost title to his property by a sale made by authority of the judgment, and that at such sale the property has been struck off at a grossly inadequate price. That one was indebted ought not in equity to preclude him from relief from spoliation, accomplished by the aid of a proceeding judicial in form, but lacking the essential element of all judicial proceedings,—jurisdiction of the person condemned. Hence the mere want of a defense on the merits ought not in all cases to be a sufficient answer to a demand for relief, where process was not served on the complainant and he was without knowledge of the pendency of the action. Accordingly it has in several cases been held that a judgment rendered without service of process, and without the knowledge of the defendant, may be relieved against without any showing on the question of merits, for the reason that "in such a

<sup>1</sup> *Sauer v. Kansas*, 69 Mo. 46; *Thomas v. West*, 59 Wis. 103; *Rupert v. Martz*, 116 Ind. 72; *Wilkinson v. Rewey*, 59 Wis. 554; *Mulvaney v. Lovejoy*, 37 Kan. 305; *White v. Crow*, 110 U. S. 183; *Dringer v. Receiver*, 42 N. J. Eq. 573.

case the injury consists in the rendition of a judgment against a party without notice and opportunity of defense, and that it is unjust and unconscientious to attempt to enforce a judgment so obtained."<sup>1</sup> Nevertheless a decided preponderance of the decisions upon this subject declares that, notwithstanding an alleged want of service of process, a court of equity will not interfere to set aside a judgment until it appears that the "result will be other or different from that already reached,"<sup>2</sup> or in other words, that there was a defense to the action, either entire or partial.<sup>3</sup>

In Colorado, though the complainant may perhaps be required to aver that he had a defense, and to verify this averment, yet he need do no more than to convince the court that he is acting in good faith; and unless his complaint is specially demurred to, the absence of this averment is not fatal to his cause. "We are not prepared to say that such an averment is essential or traversable. The showing of merits should not be required to the extent of compelling a party against whom a judgment has been obtained, without jurisdiction over his person, to come into a court of equity and assume the burden of disproving his liability. On the contrary, a party thus circumstanced is entitled to the maintenance of his right to defend against such supposed liability in an action wherein his adversary must assume the burden of proof. This distinction is important in all cases, and in many may be absolutely controlling."<sup>4</sup> In a prior case in the

<sup>1</sup> *Bell v. Williams*, 1 Head, 229; *Ryan v. Boyd*, 33 Ark. 778; *Finney v. Clark*, 86 Va. 354; *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216; *Dobbins v. McNamara*, 113 Ind. 54; 3 Am. St. Rep. 626.

<sup>2</sup> *Taggart v. Wood*, 20 Iowa, 236; *Gregory v. Ford*, 14 Cal. 138; 73 Am. Dec. 639; *Fowler v. Lee*, 10 Gill & J. 363; 32 Am. Dec. 172; *Piggot v. Ad-dicks*, 3 G. Greene, 427; 56 Am. Dec. 547; *Crawford v. White*, 17 Iowa, 560; *Stokes v. Knarr*, 11 Wis. 389.

<sup>3</sup> *Secor v. Woodward*, 8 Ala. 500; *Coom v. Jones*, 10 Iowa, 151; *State v. Hill*, 50 Ark. 458; *Harris v. Gwin*, 10 Smedes & M. 563; *Dunklin v. Wilson*, 64 Ala. 162; *Gifford v. Morrison*, 37 Ohio St. 502; 41 Am. Rep. 537. A defendant against whom judgment, without service of process, is recovered on an outlawed note is entitled to relief in equity: *Gerriah v. Seaton*, 73 Iowa, 15.

<sup>4</sup> *Wilson v. Hawthorne*, 14 Col. 530; 20 Am. St. Rep. 290.

same state, in which the property of the defendant had been sold under the judgment, relief was granted, and the court said: "It is claimed, however, that the appellant's case is fatally defective, because it appears that the judgments in the attachment suits were founded upon an indebtedness both just and due at the time the judgments were rendered, and if set aside, and a retrial of the case had, the result must be the same. Where the fraud of the party, as in this case, enters into the procurement of the judgment, it is doubtful if a court should require a showing of merits as a condition of relief. Then, again, while courts will not do an idle thing, and therefore will not ordinarily set aside a judgment when it appears, by reopening the case, the same judgment must be again rendered upon a trial of the cause upon its merits, yet courts frequently enjoin the collection of so much of judgments fraudulently obtained as is shown to be inequitable or excessive. And so where sales or deeds have been made under such fraudulent judgments, courts have drawn a distinction between such sales and deeds and the fraudulent judgments themselves: *Litchfield's Appeal*, 28 Conn. 127; 73 Am. Dec. 662; *Martin v. Parsons*, 49 Cal. 94. Before a man's property is sold and deeded away, he should have an opportunity to pay the debt or redeem the property from sale. This right to redeem is a valuable right, secured by positive statutory enactment; which right, in this case, was denied appellant, and its property sequestered without notice to it. Under these circumstances, we believe that courts of equity should grant appropriate relief, without inquiry as to the merits of the original claim. As said in the former opinion, these judgments, as to appellant, 'are absolute nullities,' and consequently cannot be made the basis of a valid sale."<sup>1</sup>

In some of those states in which it is necessary for the complainant to show that he had a defense in the original action, it appears not to be sufficient for him to aver, in

<sup>1</sup> *Great W. M. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204.

general terms, the existence of the defense. He must state the facts, so as to enable the court to determine whether he has a good defense or not.<sup>1</sup>

§ 499. **Unauthorized Appearance of Attorney.**—The early cases undoubtedly tolerated the proposition that a judgment based upon the unauthorized appearance of an attorney, and in the absence of any service of process upon the defendant, formed an exception to the general rule that a judgment which the party against whom it was pronounced had no opportunity to prevent, would be treated as invalid in equity. It was said that "the mere appearance of an attorney for a party, even without authority, is always deemed sufficient for the court, which will look no further, but proceed, and will leave the party to his remedy against the attorney,"<sup>2</sup> unless the attorney was in irresponsible or suspicious circumstances, or his appearance was through the procurement of the plaintiff.<sup>3</sup> In chancery, the rule was, in cases where a solicitor appeared without authority, that if the adverse party had acquired no rights, the party for whom the solicitor presumed to act might apply to the court and have the proceedings corrected, and the solicitor compelled to pay the costs. But if the adverse party had acquired any rights, or had been subjected to the payment of any costs, the proceedings were permitted to stand, if the solicitor was responsible, and the injured party left to seek redress against the solicitor.<sup>4</sup> Now it seems to be a rule applicable to the greater part of the United States that a judgment resting upon the unauthorized appearance of an attorney may be annulled in equity,<sup>5</sup> *irrespective of the*

<sup>1</sup> Chicago etc. R'y Co. v. Manning, 23 Neb. 552; Mulvaney v. Lovejoy, 37 Kan. 306; Winters v. Means, 25 Neb. 241; 13 Am. St. Rep. 489.

<sup>2</sup> Burrill's Practice, note a to p. 37; citing 6 Johns. 34, 296; 1 Binn. 214; 1 Pet. C. C. 155; 9 Wend. 499; 2 Hill, 64.

<sup>3</sup> Hoffmire v. Hoffmire, 3 Edw. Ch. 174; Buntion v. Lyford, 37 N. H. 512; 75 Am. Dec. 144; Smyth v. Balch, 40

N. H. 363; Everett v. Warner, 58 N. H. 340.

<sup>4</sup> American Ins. Co. v. Oakley, 9 Paige, 496; 38 Am. Dec. 561.

<sup>5</sup> Ridge v. Alter, 14 La. Ann. 866; Marvel v. Manouvrier, 14 La. Ann. 3; 74 Am. Dec. 424; Wiley v. Pratt, 23 Ind. 628; Boro v. Harris, 13 Lea, 36; Macomber v. Peck, 39 Iowa, 351; Reynolds v. Howell, L. R. 8 Q. B. 398.

question whether the attorney is *responsible* or *irresponsible*, the judgment lien being preserved to secure the plaintiff from loss should he afterward recover at a trial on the merits.<sup>1</sup>

The reasons inducing this change in the rule, together with a general statement and history of the law upon this subject, are thus set forth in an opinion written by Dillon, then chief justice of Iowa: "The ancient common law required the parties to be present and prosecute or defend in person. It required a patent or special authority from the crown to enable parties to appear by attorney. Afterward, by various statutes, the right to appear by attorney was recognized. In the earlier stages of the law the attorneys were appointed orally in court. Afterward they were allowed to be appointed by warrant out of court, and the practice of the court was to require the warrant to be filed, which, however, might be done at any time before judgment; and the want of it in the record was aided by statute, and could not be assigned for error. This strictness has been gradually relaxed, until it is at the present time the settled rule that although an attorney cannot without special authority admit service of *jurisdictional process* upon his client, yet it will be presumed in all collateral proceedings, and perhaps on appeal or in error, that a regular attorney at law who appeared for the defendant, though not served, had authority to do so. To entitle a party who has been represented by an unauthorized attorney to be relieved, he must negative the presumption of authority in the attorney, and this he cannot ordinarily do by appeal or writ of error. He must apply for relief either by motion or by bill in equity. No examination of this subject would be complete without reference to the leading authorities in English and American courts. It is laid down as law in an early case in Salkeld

<sup>1</sup> Gifford v. Thorn, 9 N. J. Eq. 702, Am. Dec. 491; Jones v. Williamson, 5 722; Allen v. Stone, 10 Barb. 547; Cold. 371; Newcomb v. Dewey, 27 Ellsworth v. Campbell, 31 Barb. 134; Iowa, 381.  
De Louis v. Meek, 2 G. Greene, 55; 50

that 'when an attorney takes on himself to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him.'<sup>1</sup> This rule has, we submit, no foundation in reason to stand upon. It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by the judgment of a court without a day in court. It relieves the other party of the duty which in reason belongs to him; viz., *to serve his process, and to see at his peril that his adversary is in court.* It carries out this unsoundness by compelling the *wrong party* to look to the attorney. Then reason and logic would say, if an attorney appeared for me without my knowledge or authority, express or implied, I should not be bound by the act if never ratified or promptly disavowed, and if the adverse party, being ignorant of the want of authority, and carelessly omitting to serve process or to require the attorney to show his authority, has been damaged, he, and not myself, should be the one to look to the attorney. That such a rule as the one laid down in 1 Salkeld, 86, should permanently stand without modification as the law of enlightened tribunals would be impossible. But, as I shall proceed to show, 'the courts, instead of overturning, have gradually undermined it, till, if it now stands, it is tottering and ready to fall.' In 1 Salkeld, 88, 'an attorney appeared, and judgment was entered against his client, and he had no warrant of attorney, and now the question was, if the court could set aside the judgment. *Et per curiam*: If the attorney be able and responsible, we will not set aside the judgment. The reason is, the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but if the attorney be not responsible or suspicious, we will set aside the judgment, for otherwise the defendant has no remedy, and any one may be undone by that means.' Such a doctrine could not impose on the fine understanding of Lord Mansfield, and the case of

<sup>1</sup> 1 Salk. 86.

*Robson v. Eaton*, 1 Term Rep. 62, without professedly overruling the cases in *Salkeld*, does so, in effect, by proceeding upon directly opposite principles. This will be obvious from a brief statement of the case, which was an action for money had and received. The defendant pleaded that the plaintiff, William Hodgson, by his attorney, had before sued the defendant and recovered a judgment for the same cause of action; that the defendant, by order of the court, paid the amount of such recovery into court, and the same had been received by the plaintiff's said attorney. This was apparently a good defense. To it the plaintiff replied that he never retained said Hodgson to sue the defendant, or authorized him to receive the money. Both parties were innocent of fraud. The warrant of attorney was forged; Hodgson, ignorant of the forgery, collected the money, and in good faith paid it to the forger. And the question was, Could the defendant rely upon the former recovery, or must he pay the money twice? Now, I suppose if, on grounds of public policy, a *defendant* is bound by the act of an unauthorized attorney who appears for him, the plaintiff ought, upon the same ground, to be bound by the act of an unauthorized attorney who appears for him. The principle is the same. It was decided that the defendant must again pay the money. And the ground of the decision was, that the attorney who prosecuted the former suit in the plaintiff's name had no authority for so doing."

Judge Dillon then proceeded to consider the cases in New York upon this subject, and added: "In other states it is now the constant practice to relieve parties, sometimes by motion and sometimes in chancery, from judgments rendered against them in consequence of the totally unauthorized acts of a pragmatical attorney.<sup>1</sup> And in England, in the court of exchequer, the rule as laid

<sup>1</sup> See *Critchfield v. Porter*, 3 Ohio, 55; *De Louis v. Meek*, 2 G. Greene, 55; 50 518; *Shelton v. Tiffin*, 6 How. 163; Am. Dec. 491; *McKelway v. Jones*, 18 Campbell v. Bristol, 19 Wend. 101; N. J. L. 345; *Price v. Ward*, 25 N. J. Truett v. Wainwright, 4 Gilm. 420; L. 225.



down in *Salkeld* has quite recently, and upon great consideration, been criticised and partially, at least, overturned. See *Bayley v. Buckland*, 1 Ex. 1, where Rolfe, B., alluding to 1 *Salkeld*, 88, says: 'The non-responsibility or suspiciousness of the attorney is but a vague sort of criterion of safety to the defendant, and by the hypothesis the defendant is wholly without blame, and may, notwithstanding, be ruined. It is true that the plaintiff is equally blameless, but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and the possible loss of costs.' And the court, where the appearance for the defendant is unauthorized, proceeds to make a distinction between cases where process has been served and cases where it has not. If, says the court, the *process is served*, the plaintiff innocent of any fraud or collusion, and the attorney is responsible, the party for whom the attorney appeared is confined to his remedy against him. The reason given is, that here the plaintiff is without blame, and the defendant is guilty of negligence in not appearing and making his defense by his own attorney, if he has any defense on the merits. But, on the other hand, 'if the plaintiff, *without serving the defendant*, accept the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant then is wholly free from blame, and *plaintiff* not; so we must set aside the judgment.'"<sup>1</sup>

§ 500. **Authorized Act of Regular Attorney.**—If an attorney is authorized to appear, the jurisdiction over the

<sup>1</sup> *Harshey v. Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520. Judge Dillon refers all those inclined to pursue the subject further in the light of English adjudications to *Doe v. Eyton*, 3 Barn. & Adol. 785; *Hubbart v. Phillips*, 13 Mees. & W. 702; 14 L. J., N. S., 103; *Williams v. Smith*, 1 Dowl. Pr. 632; *Mudry v. Newman*, 1 Crompt. M. & R. 402; *Odell v. Odell*, 1 Jones (Ir.) 81; *Morgan v. Thorne*, 7 Mees. & W. 400; *Hawbridge v. De la Crouce*, 3 Man. G. & S. 742; *Stanhope v. Firman*, 3 Bing. N. C. 303.

defendant is perfect, and the subsequent action of the attorney, not induced by the fraud of the adverse party, is binding on the client at law and in equity.<sup>1</sup> According to Lord Hardwicke, "when a decree is made by consent of counsel, there lies not an appeal or rehearing, though a party did not really give his consent, but his remedy is against his counsel; but if such decree was by fraud and covin, it may be relieved against, not by rehearing or appeal, but by original bill";<sup>2</sup> and such beyond doubt is still the rule.<sup>3</sup> The rule that a party cannot in equity find relief from the consequence of his own negligence or of a mistake of the law is equally applicable where the mistake or neglect is that of his attorney employed in the management of the case.<sup>4</sup>

§ 500 a. **Mistake, Accident, and Surprise.**—In treating of the vacation of judgments upon motion, we considered the fact that a judgment was procured by mistake, accident, or surprise as a ground of relief therefrom. Substantially the same grounds of relief may be urged with success in equity, except when refused on the ground that an adequate remedy existed at law, and no reason is shown why it was not pursued. Mistakes of fact, whether made by the court or by one of the parties, have been successfully employed as grounds for obtaining the interposition of courts of equity, and securing the relief of the party injured by the mistake.<sup>5</sup> Thus a suit was brought on a note, and the defendants made no defense, and "the attorney who was attending the case made a mistake in calculating the interest on the note, and when the case was called for judgment, the judge, without calculating the amount, asked the attorney, who, being under a mistake himself, replied \$405.55, and

<sup>1</sup> *Vaughn v. Hewitt*, 17 S. C. 442.

<sup>2</sup> *Bradish v. Gee*, 1 Amb. 229.

<sup>3</sup> *Gifford v. Thorn*, 9 N. J. Eq. 702, 722; *Jones v. Williamson*, 5 Cold. 371.

<sup>4</sup> *Wynn v. Wilson*, Hemp. 698; *Chester v. Apperson*, 4 Heisk. 639; *Shricker*

*v. Field*, 9 Iowa, 366; *Winchester v. Grosvenor*, 48 Ill. 517.

<sup>5</sup> *Chase v. Manhardt*, 1 Bland, 350; *Ford v. Ford*, Walk. (Miss.) 506; 12 Am. Dec. 587; *Drew v. Clarke, Cooke*, 373; 5 Am. Dec. 698.

the judgment was rendered by mistake for that amount, when it should have been for \$507.80." The plaintiff, discovering the mistake after it was too late to correct it on motion, brought a suit in equity to correct it, by compelling the defendant to pay the amount left out by mistake; and it was held that equity had, under the circumstances, jurisdiction to grant the relief sought.<sup>1</sup> A like decision was made when it appeared that a jury omitted to allow the plaintiff interest to which he was entitled.<sup>2</sup> It seems to be well established by the authorities that a mistake in calculating the amount due by which the judgment was entered for a wrong sum may be corrected in equity. An error in computation is not necessarily attributable to negligence, for "the most careful and expert calculators sometimes make mistakes." So where a judgment is occasioned by the mistake of the judge, the party against whom it was entered may have relief in equity. In Georgia, a meritorious bill of exceptions was dismissed because of a mistake in a date made by the certifying judge. A bill was then filed to enjoin the judgment and for a new trial. The supreme court of the state, in passing upon this case, said: "Courts of equity are open to grant relief in cases of great injustice and wrong arising from mistake without negligence and fault upon the part of counsel or parties. The dismissal of the case was owing to the misdate of the judge in his certificate. It was the duty of the judge to have put the correct date. The fault was not one for which the law should punish parties, and for which, under the rules, the case was dismissed. It was not beyond the reach of a court of equity to interpose and take jurisdiction of the parties and subject-matter; and if it appeared there was merit in the case, and injustice would result

<sup>1</sup> *Wilson v. Boughton*, 50 Mo. 17. See, to same effect, *Boone v. Miller's Ex'rs*, 16 Mo. 467.

<sup>2</sup> *Cohen v. Dubose*, 1 Harp. Eq. 102; 14 Am. Dec. 709; *Walker v. Villavaso*, 26 La. Ann. 42.

<sup>3</sup> *Sidener v. Coons*, 83 Ind. 183; *Barthell v. Roderick*, 34 Iowa, 518; *Partridge v. Harrow*, 27 Iowa, 96; 99 Am. Dec. 643.

from the act or mistake of the judge in the premises, it was the duty of a court of equity to enjoin the collection of the judgment, and stay proceedings until a fair and full hearing upon the merits had been had."<sup>1</sup> A mistake of the clerk of the court in not entering a judgment as rendered may also entitle a party to relief in equity,<sup>2</sup> as where through a mistake in describing real property a decree of foreclosure does not include all the premises directed to be sold,<sup>3</sup> or a decree in partition does not correctly describe a boundary line between two of the allotments.<sup>4</sup> Relief will be granted when judgment was occasioned by the failure of an attorney to make a defense, and this failure arose, not from his neglect, but from incorrect information given him with respect to the terms of the court.<sup>5</sup> But equity will never interpose to vacate or enjoin a judgment on the ground of mistake or ignorance of law,<sup>6</sup> nor because of a mistake of law caused by the opinions or suggestions of the judge before whom the cause was tried.<sup>7</sup> In addition to mistake there are other causes which, though not chargeable to any fraud or misconduct of the prevailing party, are nevertheless sufficient to warrant the interposition of equity to prevent the enforcement of an unjust judgment or decree. These other causes include sickness, accident, surprise, and all other

<sup>1</sup> *Kohn v. Lovett*, 43 Ga. 180. See also *Brewer v. Jones*, 44 Ga. 71, where the mistake for which the judgment was opened in equity was the mistake of the judge in failing to mark the name of counsel to the defense of a suit, in consequence of which judgment was entered by default. But in *Bank of Tennessee v. Patterson*, 8 Humph. 352, 47 Am. Dec. 618, a court of equity refused to grant relief against a mistake in the entry of a judgment of which the only evidence was parol.

<sup>2</sup> *Partridge v. Harrow*, 27 Iowa, 96; 99 Am. Dec. 643. But the code of Iowa now declares that a judgment in an ordinary action shall not be annulled or modified by equitable proceedings, except for a defense which has arisen or been discovered since judgment

was rendered. Therefore the courts of that state cannot relieve a party from the mistake of a clerk in entering a general judgment, instead of a judgment of dismissal: *Lowery v. Greene County*, 75 Iowa, 338.

<sup>3</sup> *Snyder v. Ives*, 42 Iowa, 157.

<sup>4</sup> *Smith v. Butler*, 11 Or. 46.

<sup>5</sup> *County of Buena Vista v. I. F. & S. C. R.*, 49 Iowa, 657.

<sup>6</sup> *Hubbard v. Martin*, 8 Yerg. 498; *Richmond v. Shippen*, 2 Pat. & H. 327; *Meem v. Rucker*, 10 Gratt. 506; *Schrieker v. Field*, 9 Iowa, 366; *Yarborough v. Thompson*, 3 Smedes & M. 291; 41 Am. Dec. 626; *Dickerson v. Commissioners*, 6 Ind. 128; 63 Am. Dec. 373.

<sup>7</sup> *Risher v. Roush*, 2 Mo. 95; 22 Am. Dec. 442.

causes by reason of which, and without any fault on his part, the losing party is unable to present his cause of action or defense.<sup>1</sup> If process was served, the failure to appear and make a defense must not have been due to lack of diligence and ordinary attention to business. Hence relief will not be granted on the mere allegation that complainant did not recollect the service of process,<sup>2</sup> or believed it was intended for another person, and relied on the officer who served it giving further information as to whether it was intended for him.<sup>3</sup> Illness of a party or of his counsel, or accident preventing either from attending court or doing any act necessary to the defense, may be a sufficient ground for the interposition of equity, provided it appears to have been the cause of the failure to make a proper and efficient defense, and the complainant could not by the exercise of due diligence have prevented the injurious consequences of the accident or misfortune, nor obtained adequate relief therefrom in the original action.<sup>4</sup> Relief will not be granted on the mere allegation that the complainant was in delicate health and impoverished circumstances.<sup>5</sup> Relief may also be granted because of surprise; as when a cause was taken up and tried in the absence of the defendant after a general order had been made continuing all litigated cases to an ensuing term of court;<sup>6</sup> or the defendants were induced to proceed to trial by the pretense of the payee of a usurious note that he had sold it, and could be examined as a witness at the trial, and he, when called as such witness, testified that he was still a real party in interest, and refused on that ground to give his testimony on the question of usury;<sup>7</sup> or the failure of the defendant to appear at the

<sup>1</sup> *Rice v. Railroad Bank*, 7 Humph. 39; *White v. Washington*, 5 Gratt. 645; *Kersey v. Rash*, 3 Del. Ch. 321.

<sup>2</sup> *Deweese v. Richardson*, 1 A. K. Marsh. 312; *Cullum v. Casey*, 1 Ala. 351.

<sup>3</sup> *Higgins v. Bullock*, 73 Ill. 205.

<sup>4</sup> *Brooks v. Whitson*, 7 Smedes & M.

513; *Crim v. Handley*, 94 U. S. 652; *Pharr v. Reynolds*, 3 Ala. 521; *Hord v. Dishman*, 5 Call, 279; *Clifton v. Livor*, 24 Ga. 91.

<sup>5</sup> *Royce v. Hampton*, 16 Nev. 25.

<sup>6</sup> *Jones v. Kincaid*, 5 Lea, 677.

<sup>7</sup> *Poast v. Boardman*, 10 Paige, 590.

trial was due to the fact that when judgment had been entered in his favor on demurrer, his attorney had told him that was the end of the case; had not advised him of a subsequent appeal resulting in a reversal of the judgment on demurrer; that said attorney, soon after the recovery of the first judgment, left the state and did not return, and the client resided in another county, was ignorant of the forms of law, and had but little knowledge of the English language.<sup>1</sup>

§ 501. **Equitable Defenses.**—If a defendant in an action at law has a defense of an equitable nature which a court of law is not competent to entertain, he may have relief in chancery against the judgment law, whether he made an ineffectual attempt to assert his equitable defense or not.<sup>2</sup> If a party sued at law has a defense of an equitable character, but of which a court of law can take cognizance, he need not, in general, present his equitable defense, but may allow judgment by default to be taken against him, and may afterward assert his equitable defense for the purpose of obtaining relief against the judgment.<sup>3</sup> A recovery in an action of ejectment in which nothing but the legal title is in issue is no bar to any proceedings in chancery founded on the equitable title.<sup>4</sup> But if a party sued at law makes his defense there, he is considered as electing to defend at law, and is bound to present every defense which he can.<sup>5</sup> His election to defend at law is considered as irrevocably made "by offering any defense whatever, it matters not whether by demurrer

<sup>1</sup> *Bibb v. Kreutz*, 20 Cal. 110.

<sup>2</sup> *Kersey v. Raab*, 3 Del. Ch. 321; *Newton v. Field*, 16 Ark. 216; *Vennum v. Davis*, 35 Ill. 568; *King v. Baldwin*, 17 Johns. 384; 8 Am. Dec. 415; *Caloway v. McElroy*, 3 Ala. 406; *Crim v. Handley*, 94 U. S. 652; *Bachelor v. Bean*, 76 Me. 370; *Pollock v. Gilbert*, 16 Ga. 398; 60 Am. Dec. 732; *ante*, sec. 281.

<sup>3</sup> *Morrison v. Hart*, 2 Bibb, 4; 4 Am.

Dec. 663; *Hempstead v. Watkins*, 6 Ark. 317; 42 Am. Dec. 696; *Fannin v. Thomasson*, 45 Ga. 533; *Clay v. Fry*, 3 Bibb, 248; 6 Am. Dec. 654.

<sup>4</sup> *Allen v. Stephanus*, 18 Tex. 658; *Brown v. Wyncoop*, 2 Blackf. 230.

<sup>5</sup> *Hendrickson v. Hinckley*, 17 How. 443; *Curtis v. Cisa's Adm'r*, 1 Ohio, 432; *Burton v. Hynson*, 14 Ark. 32; *Harlan v. Wingate*, 2 J. J. Marsh. 138.

to the declaration, by plea in abatement, or in bar."<sup>1</sup> Some of the decisions affirm that the rule that he who makes an ineffectual defense at law will not be allowed to call equity to his aid will sometimes yield to a case of peculiar and extraordinary hardship. The defense of usury being presented at law before a justice was by him disallowed. The appeal attempted to be taken from his judgment was dismissed, through no fault of the appellant, but on account of some error of the justice or his clerk. The appellant was then granted relief in equity on the ground "that it would be highly unjust and unreasonable to turn the party away because he had *tried* to make his defense at law."<sup>2</sup> It is not improbable that this, like many other cases of "peculiar and extraordinary hardship," has rather occasioned a violation than established an exception to the true rule. When a defense is one of which courts of law and of equity have concurrent jurisdiction, it is reasonable to require the defendant, if he makes any defense at law to make his whole defense there, if it is possible for him to do so. If, however, he has or thinks he has a defense at law and also a defense of which the court of law cannot take cognizance, the fact that he makes the best defense he can at law ought not to preclude his afterward asserting in equity the other defense which he could not make at law.<sup>3</sup> In the states having a code of procedure similar to that of New York, in which jurisdiction of law and equity is confided to the same court, and a defendant in an action at law may plead equitable as well as legal defenses, the question arises whether he *must plead* such defenses, or whether failing to plead them, he may obtain relief in an independent suit. The courts are very evenly divided upon this question, those on the one side insisting that legal

<sup>1</sup> *Le Guen v. Gouverneur*, 1 Johns. Cas. 505; 1 Am. Dec. 121; *Arrington v. Washington*, 14 Ark. 218; *Haughy v. Strong*, 2 Port. 177; 27 Am. Dec. 648; *Dutil v. Pacheco*, 21 Cal. 438; 82

Am. Dec. 749; *Dickson v. Richardson*, 16 Ark. 114.

<sup>2</sup> *Cave v. Davis*, 5 Mon. 392.

<sup>3</sup> *Greenlee v. Gaines*, 18 Ala. 196; 48 Am. Dec. 49.

defenses not interposed are forever lost,<sup>1</sup> and the other maintaining that their interposition, though a privilege, is not a duty, and therefore that the defendant may reserve them for an independent suit in which he is the actor.<sup>2</sup>

§ 502. **Legal Defenses, Neglect in Presenting.**—"While the law affords complete remedies to those who are diligent, it cannot level its rules to subserve the purposes of those who are guilty of negligence and delay."<sup>3</sup> It is therefore a general rule that parties are to be held to the exercise of caution and diligence in the management of their lawsuits, and are not to be allowed a double opportunity of presenting their defenses.<sup>4</sup> A complainant in equity seeking to avoid the effect of a judgment against him at law must therefore always disclose a sufficient excuse for not making his defense in the original action.<sup>5</sup> One who purchases real estate for which an action of ejectment is pending, if he relies upon his grantor or his grantor's attorney to conduct the defense without making any agreement with them in reference to the subject, cannot have the judgment set aside in equity on the ground that he did not know of the time of the trial. Those who purchase lawsuits must not neglect to defend them.<sup>6</sup> Nor will any judgment be opened for want of

<sup>1</sup> Kelly v. Hurt, 74 Mo. 561; Winfield v. Bacon, 24 Barb. 154; Savage v. Allen, 54 N. Y. 458; Mandeville v. Reynolds, 68 N. Y. 528; *ante*, sec. 281.

<sup>2</sup> Dorsey v. Reese, 14 B. Mon. 157; *ante*, sec. 281; Golson v. Dunlap, 73 Cal. 165; Hough v. Waters, 30 Cal. 310.

<sup>3</sup> Norris v. Denton, 2 Cal. 378.

<sup>4</sup> Casey v. Gregory, 13 B. Mon. 505; 56 Am. Dec. 581; Robuck v. Harkins, 38 Ga. 174; Slack v. Wood, 9 Gratt. 40; Lansing v. Eddy, 1 Johns. Ch. 49; Parker v. Jones, 5 Jones Eq. 276; 75 Am. Dec. 441; Tapp v. Rankin, 9 Leigh, 478; Wright v. King, Harr. (Mich.) 12; Powell v. Boring, 44 Ga. 160; Hiley v. Hartridge, 44 Ga. 623; Brand v. Stafford, 28 La. Ann. 51;

Sargeant v. Bigelow, 34 Minn. 370.

<sup>5</sup> Meniffee v. Myers, 33 Tex. 691; Yancy v. Fenwick, 4 Hen. & M. 423; Jevne v. Osgood, 57 Ill. 340; Jackson v. Patrick, 10 S. C. 197; Smith v. Molain, 11 W. Va. 654; Neal v. Henderson, 72 Ga. 209; Skinner v. Deming, 2 Ind. 558; 54 Am. Dec. 463; Kelleher v. Boden, 55 Mich. 295; Jordan v. Thomas, 34 Miss. 72; 69 Am. Dec. 387; Brenner v. Alexander, 16 Or. 349; 8 Am. St. Rep. 301; Broden v. Reitzenberger, 18 W. Va. 236.

<sup>6</sup> Mastick v. Thorp, 29 Cal. 444. "By refusing to relieve parties against the consequences of their own neglect, it (the law) seeks to make them vigilant and careful"; Ewing v. McNairy, 20 Ohio St. 315.



proper evidence to identify property,<sup>1</sup> nor for any negligence in making proofs at a trial.<sup>2</sup> Sureties cannot be relieved because their principal was granted an extension of time before the suit, the interposition of that defense not being prevented by fraud, accident, or the wrongful act of the plaintiff.<sup>3</sup> On the same principle a defendant suffering judgment which he might have avoided by pleading and proving his discharge in bankruptcy cannot obtain relief therefrom in equity.<sup>4</sup> In some cases relief has been granted from judgments based upon usury,<sup>5</sup> and also upon gambling debts,<sup>6</sup> probably because these causes of action were regarded with great aversion; but these cases are opposed by other adjudications of at least equal weight,<sup>7</sup> and they certainly make inroads on well-established principles, without any sufficient justification for so doing.

§ 503. **Want of Diligence.**—In the management of a case, the parties are bound to use such a degree of diligence "as is requisite in the ordinary business of life."<sup>8</sup> Whatever be the ground upon which relief in equity is sought against a prior judgment, it cannot be received as sufficient, if, notwithstanding its existence, the complain-

<sup>1</sup> *Pickens v. Yarborough*, 39 Ala. 408.

<sup>2</sup> *Yantis v. Burdett*, 3 Mo. 457; *Harnsberger v. Kinney*, 13 Gratt. 511.

<sup>3</sup> *Vilas v. Jones*, 1 N. Y. 274.

<sup>4</sup> *Bellamy v. Woodson*, 4 Ga. 175; 48 Am. Dec. 221.

<sup>5</sup> *Frierson v. Moody*, 3 Humph. 561; *Brown v. Toell's Adm'r*, 5 Rand. 543; 16 Am. Dec. 759. But equity will only take jurisdiction where the defense of usury could not have been made at law without great embarrassment and difficulty, in consequence of the great number of usurious contracts and securities: *Frierson v. Moody*, 3 Humph. 561; *Brown v. Toell's Adm'r*, 5 Rand. 543; 16 Am. Dec. 759; *Lindale v. James*, 3 Cold. 477; *Buchanan v. Nolin*, 3 Humph. 63, 559.

<sup>6</sup> *Woodson v. Barrett*, 2 Hen. & M. 86; 3 Am. Dec. 612; *Skipwith v. Strother*, 3 Rand. 214; *Clay v. Fry*, 3

*Bibb*, 243; 6 Am. Dec. 654; *Lucas v. Waul*, 12 Smedes & M. 157. Such relief is given in Illinois by statute, when judgment is rendered for money won in gambling at cards or other games: *Mallett v. Butcher*, 41 Ill. 332; *West v. Carter*, 129 Ill. 249. The statute is strictly construed, and is not available in favor of one who, neglecting to defend at law, suffered judgment on a note given for money bet on the result of an election: *Lucas v. Nichols*, 66 Ill. 41.

<sup>7</sup> *Giddens v. Lea*, 3 Humph. 123; *Chinn v. Mitchell*, 2 Met. (Ky.) 92; *Owen v. Gibson*, 74 Ga. 455.

<sup>8</sup> *Burton v. Wiley*, 26 Vt. 430; *Lattrell v. Fisher*, 11 Heisk. 101; *Taylor v. Bradshaw*, 6 Mon. 145; 17 Am. Dec. 132; *Henderson v. Mitchell*, 1 Bail. Eq. 113; 21 Am. Dec. 526; *Edwards v. Handley*, *Hardin*, 611; 3 Am. Dec. 745.

ant by the exercise of reasonable diligence might have escaped from injury therefrom by defending with success the former action.<sup>1</sup> Therefore the fact that defendant did not know of a defense of which he might have availed himself, and discovered it only after judgment had been entered against him, does not entitle him to relief from such judgment, if he might have discovered and asserted such defense at the proper time by the exercise of ordinary diligence.<sup>2</sup> No litigant can come within the rule in respect to diligence, who does not give his personal attention to his case, at least so far as to place it in the hands of his counsel, and to afford that counsel all the means and information necessary to conduct his part in the litigation. A party cannot have an injunction because he wrote to an attorney to attend to the case. He will not be excused from attending to it himself, until he shows that he could not have done so on account of circumstances not imputable to himself.<sup>3</sup> If a party merely writes to an attorney to attend and make his defense, but pays no fee, and institutes no inquiry in relation to the case, and it happens that from misapprehension or otherwise the attorney does not make such defense, the "laches are too gross to be relieved. It is the duty of litigants to be vigilant in caring for their interests, and they are not to presume that a lawyer to whom they have paid nothing, from whom they have never heard, is taking care of their interests."<sup>4</sup> And where a party retains an attorney, but does not attend court, nor furnish witnesses, he cannot be relieved on showing that he fears the attorney was in the interest of his adversary.<sup>5</sup> Equity will not relieve on the ground of the absence of a witness

<sup>1</sup> *Nevins v. McKee*, 61 Tex. 412; *Birch v. Frans*, 77 Ind. 199; *Wells v. Wall*, 1 Or. 295; *Augusta M. L. A. v. McAndrews*, 63 Ga. 490; *Zellerbach v. Allenberg*, 67 Cal. 296; *Brownson v. Reynolds*, 77 Tex. 254.

<sup>2</sup> *Meek v. Howard*, 10 Smedes & M. 502; *Ludington v. Hadley*, 7 W. Va. 269; *Taylor v. Sutton*, 15 Ga. 103; 60

Am. Dec. 682; *Skinner v. Deming*, 2 Ind. 558; 54 Am. Dec. 463; *Tutt v. Ferguson*, 13 Kan. 45; *Carolus v. Koch*, 72 Mo. 645; *Stinnett v. Branch Bank*, 9 Ala. 120.

<sup>3</sup> *Stanard v. Rogers*, 4 Hen. & M. 438.

<sup>4</sup> *Hill v. Bowyer*, 18 Gratt. 364.

<sup>5</sup> *Albro v. Dayton*, 28 Ill. 325.

who, with diligence, could have been procured, nor on the ground that a witness was guilty of perjury, nor because the suitor was absent from court; for it is his business to be there.<sup>1</sup> Neither is a party to be relieved because he failed to prove his defense for want of the evidence of the nominal plaintiff, who, contrary to the expectations of the defendant, was not present at the trial.<sup>2</sup> Sureties on whom process was served, and who did not consult their principal, and who failed to interpose any defense, cannot enjoin the judgment for usury.<sup>3</sup> A was summoned as a garnishee in a suit of B against C, and having answered that he owed C a specified sum, judgment was entered accordingly. Afterward A was summoned in a suit by D against C, when he again answered that he owed C the sum for which judgment had already been given, and a second judgment was thereupon entered against A, and by him was paid. When the first judgment was about to be enforced, A sought to enjoin its collection on the ground that he had no notice of its rendition when he paid the second judgment, and that he was absent from the state for six weeks after being summoned in the first action. But the court thought that he might have known of the first judgment by exercising the slightest diligence, and refused to render him any aid.<sup>4</sup> One who has permitted judgment by default to be rendered against him upon a note will not be relieved from the judgment on the sole ground that the note was given on a condition which had failed.<sup>5</sup>

§ 504. **Receipt and Release.**—Formerly it seems that a case could be reopened in equity upon the finding of a receipt or release, or other “evidence of a permanent and unerring nature to points before in issue.”<sup>6</sup> This excep-

<sup>1</sup> Gott v. Carr, 6 Gill & J. 309; Dilly v. Barnard, 8 Gill & J. 171.

<sup>2</sup> Wilder v. Lee, 64 N. C. 50.

<sup>3</sup> Smith v. Powell, 50 Ill. 21; Lucas v. Spencer, 27 Ill. 15.

<sup>4</sup> Houston v. Wolcott, 7 Iowa, 173.

<sup>5</sup> Raburn v. Shortridge, 2 Blackf. 480.

<sup>6</sup> Mitford's Chancery Pleading, 78; Winthrop v. Lane, 3 Desaus. Eq. 324; Story's Eq. Jur., sec. 879. See also Vathir v. Zane, 6 Gratt. 246. This rule prevails in Louisiana, under the provisions of the code: Florat v. Handy, 35 La. Ann. 816.

tion to the general rule requiring prudence and diligence on the part of the defendant is founded on the case of *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424, in which it is said that relief will be granted where defendant finds plaintiff's receipt, which had been lost, or if the plaintiff's book appeared to be crossed and the money paid before action brought. But if this case is to be understood as granting relief where the defense is payment or release, upon any other terms or under any other circumstances than if any other kind of defense had been made, it cannot be regarded as the law at the present time. Where a person against whom a judgment had been obtained paid a portion thereof, but, in an action upon this judgment, neglecting to plead payment, suffered the second judgment to be recovered without the allowance of any of his payments, it was held that neither he nor his bail could be relieved in equity, and that this case formed no exception to the rule that relief will not be granted "against a judgment at law on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit or it could not have been received as a defense, or unless he was prevented from availing himself of the defense by fraud, accident, or the act of the opposite party unmixed with negligence or fault on his part."<sup>1</sup> But where judgment was recovered against C. and K., and afterward revived against K., C. having died, it was subsequently to such revivor successfully resisted by K., on the ground that C. paid the judgment in his lifetime, of which fact K. could not procure any evidence when he suffered the judgment of revivor.<sup>2</sup> The loss of a receipt or other paper and its subsequent discovery may entitle a party to relief, when aided by other circumstances. Thus in a recent case in Maryland a party relied upon an agreement which he claimed to be lost. Before his

<sup>1</sup> *Foster v. Wood*, 6 Johns. Ch. 90; *Duncan v. Lyon*, 3 Johns. Ch. 356; 8 Am. Dec. 513; *Barker v. Elkins*, 1 Johns. Ch. 465.

<sup>2</sup> *Kiser v. Winans*, 20 Ind. 423.

case came on for trial his counsel were shown his acknowledgment in writing purporting to be made in 1877, and which, if then made, was inconsistent with the existence and loss of the agreement. Notwithstanding his protestations, one of his counsel withdrew from the cause, and the other refused to defend it upon the theory of the existence and loss of the paper, and merely interposed a technical defense without success. The client afterward succeeded in finding the lost paper and in showing that the acknowledgment which induced his counsel to abandon his defense had been made in 1876 instead of 1877, and that the figures 1876 therein had been altered to 1877 with such neatness and care that such alteration would escape the attention of an ordinary observer. Relief from the former judgment was therefore granted.<sup>1</sup> If, during the pendency of an action, the defendant either pays the whole amount sued for, or compromises it for a less sum, taking a receipt or release discharging him from all liability, and failing to plead such discharge, judgment is taken against him, he may obtain relief in equity therefrom. He is not guilty of want of reasonable diligence because he does not anticipate that his adversary may be enough of a scoundrel to enter up judgment after receiving full satisfaction.<sup>2</sup>

§ 505. **Representatives of Deceased Persons.**—It is obvious that an administrator or executor is not to be held to great strictness in relation to a defense arising in the lifetime of the deceased, without allowing the adverse party to take undue advantage of his necessarily superior knowledge of the matters in controversy. The fact that the person seeking relief from a judgment is an administrator is a material fact in considering the question of laches, because it is not probable that he, with due diligence, could make as complete a defense as his intestate

<sup>1</sup> *Ahl v. Ahl*, 71 Md. 555.

St. Rep. 268; *note*, sec. 492. See also

<sup>2</sup> *Gates v. Steele*, 58 Conn. 316; 18 Am. Humphreys v. Leggett, 9 How. 297.

could, if living.<sup>1</sup> That since the trial the administrator has discovered witnesses by whom proof of payment can be made is a good ground for relief, for the reason that he had no means of tracing the payment made by the deceased, and is therefore exempted from the rule that no relief can be granted where the defense could be made at law.<sup>2</sup> An administrator or executor who, believing that he has assets of the estate ample for the payment of all its debts, suffers judgment to be entered against him will be relieved in equity if those assets become insufficient through an unexpected depreciation in their value; otherwise he would be made responsible, without any fault on his part, the defense arising subsequently to the judgment being one that he could not make available in the original cause by any procedure provided at law.<sup>3</sup>

§ 505 a. **A Judgment against a Trustee in a suit to charge the trust estate will be enjoined on the application of the *cestui que trust*, if it appears that the latter was not a party to the suit, and that the cause of action sued upon was not a valid claim against the trust estate, and that the interest of the trustee was best subserved by having judgment entered against him.**<sup>4</sup>

§ 506. **Known Defenses must be Made.**—Any matter known at the time of the trial at law, or capable of being ascertained by reasonable inquiry, ought not to be available in a chancery suit.<sup>5</sup> The subsequent discovery of facts known to the witnesses called at the trial, but not known to the parties calling them, is no ground of relief.<sup>6</sup> There must be an end to litigation. No doubt the courts

<sup>1</sup> *Hewlett v. Hewlett*, 4 Edw. Ch. 7. *Wilson v. Randall*, 37 Ala. 74; 76 Am. Dec. 347; *Thomasson v. Fannin*, 54 Ga. 361; *Casey v. Gregory*, 13 B. Mon. 368.

<sup>2</sup> *Miller's Ex'rs v. Rice*, 1 Rand. 438; 505; 56 Am. Dec. 581; *Calloway v. Pickett v. Stewart*, 1 Rand. 478. *Alexander*, 8 Leigh, 114; 31 Am. Dec. 640; *Stroup v. Sullivan*, 2 Ga. 276; 46 Am. Dec. 389.

<sup>3</sup> *Meyer v. Butt*, 44 Ga. 471. <sup>4</sup> *Harrison v. Harrison*, 1 Litt. 137.

<sup>5</sup> *Kenner v. Caldwell*, 1 Bail. Eq. 149; 21 Am. Dec. 538; *Baxter v. Dear*, 24 Tex. 17; 76 Am. Dec. 79; *Gold v. Bailey*, 44 Ill. 491; 92 Am. Dec. 190; 504. But see *Stowell v. Eldred*, 26 Wis.

are extremely cautious in granting relief from a judgment on the ground that the party injured was ignorant of the existence of his defense until after the rendition of the judgment.<sup>1</sup> The true rule upon this subject is thus expressed in a recent decision: "Equity will not relieve a party against a judgment at law on the ground of a defense of which he was ignorant until after the judgment was rendered, unless he shows that by the exercise of ordinary diligence he could not discover it, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with negligence on his part."<sup>2</sup> But whenever a case arises in which a party has an unjust judgment or decree rendered against him, owing to his ignorance of his defense, and the circumstances are such that his ignorance exists without any fault, laches, or want of diligence on his part, he is certainly entitled to relief in equity.<sup>3</sup> Whenever a party asks a court of equity to grant him a new trial, he must show some reason for not getting it at law.<sup>4</sup> In Virginia, a judgment was enjoined on account of a mistake made by the jury, the making of such mistake not being known in time to be made a ground for a new trial.<sup>5</sup> That the application for a new trial at law was not heard, on account of a sudden and unexpected adjournment of the court for the term without doing any business, and before either the applicant or his counsel could get to court, is a good ground for relief in chancery.<sup>6</sup> Though the cause of action upon which a judgment has been recovered is one against which the courts and the law properly entertain a special aversion, relief cannot be had by a defendant who without a sufficient excuse failed to disclose the true nature of such cause of action and to make

<sup>1</sup> *George v. Alexander*, 6 Cold. 641. But see *Inglehart v. Mayer*, 4 Johns. Ch. (Md.) 514.

<sup>2</sup> *Garrett v. Lynch*, 45 Ala. 211.

<sup>3</sup> *Wales v. Bank of Michigan*, Harr. (Mich.) 306; *Hubbard v. Hobson*, Breese, 147; *Inglehart v. Lee*, 4 Md. Ch.

514; *Cape Sable Co.'s Case*, 3 Hand. 606; *Baltzell v. Randolph*, 9 Fla. 266.

<sup>4</sup> *Mastick v. Thorp*, 29 Cal. 444; *Harrison v. Harrison*, 1 Litt. 137.

<sup>5</sup> *Rust v. Ware*, 6 Gratt. 50; 52 Am. Dec. 100.

<sup>6</sup> *Tarver v. McKay*, 15 Ga. 550.

his defense thereto before judgment. Hence relief will not be granted solely on the ground that such cause of action was founded upon an immoral and illegal consideration,<sup>1</sup> or obtained by fraud.<sup>2</sup>

§ 507. **Discovery after Judgment.** — A material difference exists between ignorance of the facts constituting a defense, and ignorance of the evidence necessary to establish those facts. A defendant who has no intimation of the existence of a defense, and who therefore believes the cause of action produced against him to be good and valid, is not put upon inquiry, and may suffer judgment to be rendered against him without being guilty of any want of reasonable diligence. Therefore relief may be had from a judgment because of fraud discovered after it was entered.<sup>3</sup> But a defendant knowing of the existence of some defense is put upon inquiry, and is therefore bound to exercise the highest degree of diligence in discovering and producing the evidence necessary to establish all the facts material to his defense and of which he has any knowledge. If the requisite evidence can be obtained only from his adversary, he should at once take such steps as are necessary to compel his adversary to disclose it. Therefore the submission to a trial at law precludes a party from going into equity to compel plaintiff to disclose evidence in relation to any matter of which the defendant had any knowledge or intimation previously to the trial at law.<sup>4</sup> Discovery cannot be had after judgment on the ground that the defense was completely in the knowledge of the plaintiff;<sup>5</sup> nor because the defendant

<sup>1</sup> *Sample v. Barnes*, 14 How. 70; *Barker v. Simpson*, 1 Johns. Ob. 465; *Creath v. Sims*, 5 How. 192; *Given's Appeal*, 121 Pa. St. 260; 6 Am. St. Rep. 795; *Heath v. Cobb*, 2 Dev. Eq. 187.

<sup>2</sup> *New York v. Brady*, 115 N. Y. 599; *Ruff v. Doty*, 26 S. C. 173; 4 Am. St. Rep. 709.

<sup>3</sup> *Hart v. Bates*, 17 S. C. 35; *Melick v. Tama C. R.*, 52 Iowa, 94.

<sup>4</sup> *Campbell v. Briggs*, 3 Rob. (La.) 110; *Green v. Massie*, 21 Gratt. 358;

*Barker v. Simpson*, 1 Johns. Ob. 465; *Brown v. Swan*, 10 Pet. 497; *Thurmond v. Durham*, 3 Yerg. 99; *Norris v. Hume*, 2 Leigh, 334; 21 Am. Dec. 631; *Pollock v. Gilbert*, 16 Ga. 398; 60 Am. Dec. 732; *Norton v. Woods*, 5 Paige, 249; *Bartholomew v. Yaw*, 9 Paige, 165; *Deputy v. Tobias*, 1 Blackf. 311; 12 Am. Dec. 243.

<sup>5</sup> *Norris v. Denton*, 2 Cal. 378. But it is said a party has a right to rely on the presumption that his adversary



had a credit or set-off which he had no evidence in his possession to prove. It must appear, in addition to the fact that the credit or defense can be established by the plaintiff, that the defendant was not aware of the fact now sought to be brought out, prior to the trial.<sup>1</sup> But if a party, exercising due prudence and diligence, is not at the trial aware of a fact constituting a good defense, he may, after judgment, if such fact is to be established only by the oath of his adversary, go into equity and procure a new trial and a discovery. "To preclude a party from redress because he has submitted to a trial at law without going into chancery for a discovery would cut up this branch of remedial justice by the roots and oblige every defendant at law to file a bill of discovery in the first instance. The discovery of new matter after a trial at law which was within the knowledge of the plaintiff, but of which defendant had no information, and nothing to lead him to an opinion even that matters were different from the ostensible case presented by the plaintiff, is sufficient to authorize equitable relief."<sup>2</sup>

§ 508. **Neglect or Error of Counsel.**—It is undoubtedly the true rule that neither the ignorance, the blunders, nor the misapprehension of counsel, not occasioned by the adverse party, is any ground for vacating a judgment or decree.<sup>3</sup> A court of equity will not grant relief on the ground of rights lost by a misapprehension of the rules of practice,<sup>4</sup> nor because counsel was surprised at a ruling which deprived him of the right of review on appeal. "It would be an extraordinary interposition on the part of a

will not commit perjury. If his opponent, being called as a witness against himself, testifies falsely, and thereby obtains judgment, and it further appears that the losing party had no personal knowledge of the facts, and was therefore obliged to depend on his adversary, the judgment will be set aside in equity, upon showing that clear proofs have been obtained since the trial establishing the falsehood of the testimony through which the judg-

ment was secured: *Stowell v. Eldred*, 26 Wis. 504.

<sup>1</sup> *George v. Strange's Ex'r*, 10 Gratt 499; *Faulkner v. Harwood*, 6 Rand. 125.

<sup>2</sup> *Winthrop v. Lane*, 3 Demma. Eq. 323; *Deputy v. Tobias*, 1 Blackf. 311; 12 Am. Dec. 243.

<sup>3</sup> *Boston v. Haynes*, 33 Cal. 31; *White v. Bank of U. S.*, 6 Ohio, 529; *Jameson v. May*, 13 Ark. 600; *Brode v. Greenwald*, 66 Ala. 538.

<sup>4</sup> *Dibbe v. Traluck*, 12 Fla. 185.

court of equity to set aside a judgment obtained, for aught that appears to the contrary, after a full and fair investigation upon the merits before the circuit judge, merely upon the ground that counsel had by a mistake at law cut off his right to review."<sup>1</sup> Neither will relief be granted on the ground that an attorney, through design or ignorance, mismanaged the defense,<sup>2</sup> or that the client being absent on account of sickness, the counsel, through a misapprehension of the facts, consented to the decree;<sup>3</sup> nor because of any mistake, neglect, or omission of counsel in attempting to prosecute proceedings, by appeal or otherwise, to correct any alleged error of the trial court,<sup>4</sup> or in setting up or failing to establish proper defenses;<sup>5</sup> nor because an error was made in preparing a statement for a new trial in a tax suit, by which error the statement showed that the \$ appeared before the figures on the roll, when in fact the assessment was void for want of such \$. It is the duty of attorneys to prepare their statements so as to show such errors of the subordinate court as they intend to rely on in the appellate court; and the failure to perform this duty is an omission so necessarily chargeable to negligence and want of ordinary care and diligence that it cannot furnish any ground for relief in equity.<sup>6</sup> In New York the courts vacate judgments on motion, if shown to have been obtained by reason of the ignorance or negligence of an attorney, and say that they will not allow a client to be ruined because he has retained "an incompetent, negligent, or unworthy attorney."<sup>7</sup>

§ 509. **Rights Acquired by Third Persons.**—Whatever is said in this chapter in relation to vacating, enjoining, or otherwise interfering in equity with a judgment or decree must, in the absence of any statement to the con-

<sup>1</sup> *Farmers' Loan Co. v. Walworth Co. Bank*, 23 Wis. 249.

<sup>2</sup> *Burton v. Hynson*, 14 Ark. 32.

<sup>3</sup> *Burton v. Wiley*, 26 Vt. 430.

<sup>4</sup> *Daly v. Pennie*, 86 Cal. 552; 21 Am. St. Rep. 61; *Miller v. Bernecker*, 46 Mo. 194.

<sup>5</sup> *Sharp v. Moffitt*, 94 Ind. 240; *Fuller v. Little*, 69 Ill. 229.

<sup>6</sup> *Quin v. Wetherbee*, 41 Cal. 247.

<sup>7</sup> *Sharp v. Mayor of New York*, 31 Barb. 578.

trary, be understood as applying to a contest between the parties to the original judgment or decree, or to persons acquiring under them with notice of all the facts. The principles applicable after third persons have, for valuable considerations and without notice of any defects, obtained rights under one of the parties, have not been discussed as frequently as could be expected, and cannot be considered as finally settled. In relation to judgments obtained by some fraudulent device in a case where the parties are properly in court, third persons are not to be affected in their interests based upon the judgment, unless they can be shown to have acquired with knowledge of the fraud. But where the complainant seeks to avoid the effect of any judgment or decree on the ground that no process was in any manner served upon him, and that he had no knowledge or notice of the proceedings, the question arises whether he is obliged to suffer all the consequences which would result from a regular judgment because a third party has made outlays occasioned by his faith in the judgment or decree. Recently, in California, proceedings were instituted for the purpose of impeaching a judgment for taxes, and annulling a sale made thereunder, on the ground that the process in the tax suit was never served on the defendant therein. The supreme court, in deciding the case, said: "The defendant, being a purchaser for value at a judicial sale, without notice of the extrinsic facts which are relied upon to impeach the judgment, cannot be affected thereby. No principle is better settled than that a purchaser at a judicial sale, without notice, under proceedings regular upon their face, and had in a court of competent jurisdiction, is not affected by any mere error of the court for which the judgment might be reversed upon appeal, nor for any secret vice in the judgment not appearing on the face of the record, and which can be made to appear only by the production of extrinsic evidence. He is bound at his peril to inquire whether it sufficiently appears on the

face of the record that the court had jurisdiction to render the judgment, and whether there is a valid execution. But nothing more is required of him. Unless the plaintiff in the action is also the purchaser at the sale, the latter will not be affected by any mere error of the court, even though the judgment be afterward reversed for such error; nor can his rights be impaired by any secret vice in the proceedings resulting from fraud or other similar cause of which he had no notice. As between the parties to the action, a judgment fraudulently obtained will be set aside and held for naught when the fraud is made to appear. But there would be no security in titles acquired at judicial sales if the rights of a *bona fide* purchaser without notice could be overthrown by subsequent proof that the judgment was obtained by fraud, or that the record, which showed a due service on the defendant, was in fact false. The repose of titles, and indeed every consideration of public policy, demand that a purchaser at a judicial sale without notice, under proceedings regular upon their face, and by a court of competent jurisdiction, should be protected as against mere errors of the court and against secret vices in the proceedings founded on fraud, accident, or mistake, and which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. No prudent person would purchase at a judicial sale if he incurred the hazard of losing his money in case it should be made to appear that the judgment was obtained by perjury or other fraudulent practices, or that the record on which he relied as proving a service on the defendant was in fact false. These propositions are too familiar to require the citation of authorities in their support, and we have been referred to none which appears to contravene them, unless it be two cases decided by the supreme court of Iowa." The court proceeds further to declare in general terms that, as against a purchase under execution sale, the same rules and presump-

tions apply in an action in equity to avoid the sale as are applicable in a collateral attack upon the judgment.<sup>1</sup>

The decisions referred to in Iowa declare that a judgment procured by the appearance of an unauthorized attorney will be vacated in equity, though such vacation destroys the rights acquired by a *bona fide* purchaser without notice. The court in California, not being called upon to decide the precise question involved in these cases, speaks of their doctrine as follows: "If an unauthorized appearance by an attorney for a non-resident defendant who was not served with process can afterward be shown to invalidate the title of a *bona fide* purchaser without notice at the execution sale, it stands, so far as I am aware, as a solitary exception to the general rule, and the doctrine ought not to be further extended." It is here intimated that he who buys when the defendant is ostensibly in court attending to his interests, by the means with which those interests are commonly protected, may possibly take his title accompanied with perils which cannot attach themselves, where the defendant is not in any manner represented in the progress of the cause. If a distinction can be made in the two classes of cases, it should be in favor of the party who purchased under the judgment in the case where an attorney has appeared; for if any court has the power to take and exercise jurisdiction over a defendant in no manner served with process, and in any event to bind him by its judgment, then it surely cannot be that the appearance of an attorney presuming to act for such defendant can divest the court of its jurisdiction. But while the decisions made where an unauthorized attorney has appeared, and that made in California in the absence of service, where no attorney had appeared, may not be necessarily inconsistent, both cannot stand. It is obvious that the reasoning on which the decisions in Iowa were based would, if applied to the

<sup>1</sup> *Reeve v. Kennedy*, 43 Cal. 649; 17. See also *McNair v. Toloz*, 23 affirmed in *Stokes v. Geddes*, 46 Cal. Minn. 176.

case arising in California, have led to a different result from that attained in the case of *Reeve v. Kennedy*. The Iowa cases adopt the reasoning of the supreme court of the United States in *Shelton v. Tiffin*, 6 How. 163. In that case the effect of a judgment against one L. P. Perry was drawn in question. An attorney inadvertently and without any fraud or collusion appeared for L. P. Perry. A regular trial was had, there being other defendants who were properly in court, and a judgment was obtained for \$7,560. Execution having issued, the property of L. P. Perry was sold to Samuel Anderson. The court said: "In this case L. P. Perry was not amenable to the jurisdiction of the court, and did no act to authorize the judgment. He cannot therefore be affected *by it, or by any proceedings under it*. The judgment being *void* for want of jurisdiction in the court, no right passed to Samuel Anderson under the marshal's sale." After quoting this case the court in Iowa said: "It cannot validate a judgment void for want of jurisdiction that there has been a sale under it."<sup>1</sup>

§ 510. **Innocent Purchaser.**—A, holder of a senior mortgage, was summoned as a defendant in an action to foreclose a junior mortgage. The summons served stated that a foreclosure would be taken, subject to A's lien. He was therefore advised that he need not appear. A decree was taken without saving his rights, and a sale was made under such decree. A, hearing, three years afterward, of the decree and sale, endeavored to have them set aside. The court held that the decree, being regular on its face, protected the innocent purchaser, and that A's only remedy was against the plaintiff and his solicitor.<sup>2</sup> In all cases in which under a judgment not void for want of jurisdiction a *bona fide* purchaser has acquired title, and relief is sought in equity against him, he appears to be

<sup>1</sup> *Harshey v. Blackmarr*, 20 Iowa, 161, 183, 184; 89 Am. Dec. 520; *Bryant v. Williams*, 21 Iowa, 329.  
<sup>2</sup> *Hamlin v. McCahill*, Clarke Ch. 249.

protected by the well-known maxim, where the equities are equal, the legal title prevails.<sup>1</sup>

§ 511. **Relief after Denial of Motion at Law.** — Courts of law, in some instances, may determine on motion applications of which courts of equity would also take cognizance if the matter were brought before them in an independent action. In such cases the summary disposition of a question upon motion, resulting in a denial of the relief claimed, does not preclude the party from obtaining the aid of chancery. Thus though the right to set off one judgment against another is strictly an equitable right, yet courts of law may recognize and enforce it; but a refusal by a court of law to allow the set-off, after full consideration of all the rights and equities, is no bar to a bill in equity for an injunction and a set-off.<sup>2</sup> Upon the same principle the denial of a motion to open a judgment does not preclude a court of equity from subsequently granting the relief denied at law. The decision of such motion is not such a *res adjudicata* as precludes equity from re-examining the question. The opening of a judgment in a court of law is always *ex gratia*, while restraining the plaintiff from proceeding on the judgment is, in equity, a matter of right. The facilities for investigating the issues presented in the motion are usually better in equity than at law.<sup>3</sup> If, however, a defeated litigant is entitled to move for a new trial in the original action, and avails himself of this right, and his motion is heard upon the merits, and the grounds thereof adjudged to be insufficient or not sufficiently supported by his evidence, he cannot on the same grounds obtain relief in equity.<sup>4</sup>

<sup>1</sup> *Maine v. Elliott*, 51 Cal. 8; *Freeman on Executions*, sec. 343; *Fetterman v. Murphy*, 4 Watts, 424; 28 Am. Dec. 729; *Draxel v. Man*, 6 Watts & S. 386; 40 Am. Dec. 573.

<sup>2</sup> *Simpson v. Hart*, 14 Johns. 63.

<sup>3</sup> *Simpson v. Hart*, 14 Johns. 63; *Wistar v. McManes*, 54 Pa. St. 318;

93 Am. Dec. 700; *Truett v. Wainwright*, 4 Gilm. 418; *Blank v. Blank*, 107 N. Y. 91. *Contra*, *Critchfield v. Porter*, 3 Ohio, 518.

<sup>4</sup> *Gray v. Barton*, 62 Mich. 186; *Colins v. Butler*, 14 Cal. 223; *Davis v. Bass*, 4 Ind. 313; *Matson v. Field*, 10 Mo. 100.

§ 512. **Parties Who may Obtain Relief.**—No person will be permitted to proceed in equity against a judgment or decree to which he was not a party, and which did not at its rendition affect any of his rights. If the parties to an adjudication are satisfied with it, no outside persons will be permitted to intermeddle with it at law or in equity.<sup>1</sup> If their rights were paramount to the rights or titles of the parties when it was rendered, they have adequate remedies at law, and equity will not set aside or otherwise interfere with the judgment at their instance.<sup>2</sup> If their rights were acquired after the judgment was entered from one of the parties thereto, such acquisition will not vest them with the right to proceed against the judgment; for the general rule is, that a mere right to complain of a fraud or to file a bill in equity to set aside a transaction for fraud is not transferable.<sup>3</sup> The grantee of land charged with a judgment lien at the date of the grant cannot have the judgment set aside for fraud,<sup>4</sup> nor can he in any manner inquire into the consideration of the judgment for the purpose of impeaching or avoiding it.<sup>5</sup> Having taken the land subject to a lien, of which the grantor made no complaint, the grantee must abide by that lien, unless he can show that it was procured by fraud, and designed and calculated to prejudice him as a subsequent purchaser.<sup>6</sup> If an applicant seeks to open a judgment on the ground that it is in fraud of his rights as a creditor of the judgment debtor, he will not be listened to until he has made his own debt certain and indisputable by a judgment against his alleged debtor.<sup>7</sup> If one

<sup>1</sup> *Mayes v. Woodall*, 35 Tex. 687; *Dec. 740*; *Smith v. Harris*, 43 Mo. 561.

*Stone v. Towne*, 91 U. S. 341; *Whitman v. Willis*, 51 Tex. 429; *Markley v. Rand*, 12 Cal. 276; *Stewart v. Duncan*, 40 Minn. 410.

<sup>2</sup> *Harper v. Hill*, 35 Miss. 63.

<sup>3</sup> *Brush v. Sweet*, 38 Mich. 577; *Bulard v. Raynor*, 30 N. Y. 197; *Crocker v. Bellanger*, 6 Wis. 666; 70 Am. Dec. 489; *De Houghton v. Morley*, L. R. 2 Ch. 164; *Milwaukee etc. R. R. Co. v. M. & W. R. R. Co.*, 20 Wis. 183; 88 Am.

<sup>4</sup> *Marriner v. Smith*, 27 Cal. 649.

<sup>5</sup> *French v. Shotwell*, 5 Johns. Ch. 554; 6 Johns. 235.

<sup>6</sup> *Shufelt v. Shufelt*, 9 Paige, 137; 37 Am. Dec. 381.

<sup>7</sup> *Wintringham v. Wintringham*, 20 Johns. 296; *Wiggins v. Armstrong*, 3 Johns. Ch. 144; *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watta*, 3 Atk. 200; *Bennet v. Musgrave*, 2 Ves. 51.



not a party to a judgment has rights derived from one of the parties, and which may be prejudiced by the enforcement of the judgment, he may, as we have heretofore shown, impeach and avoid it when suffered through fraud and collusion.<sup>1</sup> He is also entitled to relief in equity to the extent of preventing the assertion of the judgment against him. Therefore a creditor or other person whose rights are injuriously affected by the entry of a judgment may obtain relief in equity by showing that it was procured by fraud and collusion for the purpose of defrauding him,<sup>2</sup> or was suffered by a defendant when there was a good defense on the merits, because he was the real party in interest and was indifferent to the result.<sup>3</sup> And a judgment, though founded on a just demand, may be declared inoperative as against creditors, if it was procured and suffered to hinder, delay, and defraud them.<sup>4</sup>

§ 513. *Infancy.*—A judgment against an infant is not void.<sup>5</sup> The usual practice is to insert a provision allowing an infant a day after he comes of age to show cause against a decree pronounced against him. And, except where the practice has been changed by introducing a modification of the common law in this respect, the omission of this clause is an error which will undoubtedly be corrected on appeal. According to some of the authorities, the right to show cause against a decree is the absolute right of every infant defendant,—a right which is not taken away by the omission to provide for it in the decree, and which may be enforced by bill of review or by original bill, showing that, upon the facts, the original decree

<sup>1</sup> *Ante*, c. XIII.

<sup>2</sup> *Busenbark v. Busenbark*, 35 Kan. 572; *Schuster v. Rader*, 13 Col. 330; *Palmer v. Martindell*, 43 N. J. Eq. 90; *Gottlieb v. Thatcher*, 34 Fed. Rep. 435; *Edson v. Cumings*, 52 Mich. 52.

<sup>3</sup> *Bergman v. Hutcheson*, 60 Miss. 872.

<sup>4</sup> *Bank v. Burnett Mfg. Co.*, 33 N. J. Eq. 486.

<sup>5</sup> *Martin v. Weyman*, 26 Tex. 460; *Fulbright v. Cannefox*, 30 Miss. 425; *Townsend v. Cox*, 45 Miss. 401; *Porter v. Robinson*, 3 A. K. Marsh. 254; 13 Am. Dec. 153.

is improper.<sup>1</sup> But the better opinion is, that "an infant defendant is as much bound by a decree in equity as a person of full age; therefore if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it, such as fraud, collusion, or error."<sup>2</sup> An absolute decree against an infant is at least so far binding on him that he can neither by bill of review, nor by an original bill, nor by any other proceeding impeach it so as to prejudice the interests of a *bona fide* purchaser without notice. This is equally true whether the judgment or decree is sought to be set aside on the ground that there was error in the judgment of the court in not giving a day to show cause, or error in other respects in the judgment rendered;<sup>3</sup> or whether the judgment or decree was obtained by the guardian or other representative of the infant for the purpose of defrauding him of his estate.<sup>4</sup> A judgment against an infant on a bond and warrant of attorney given by him for articles furnished to him in defiance of the request of his guardian will be set aside in equity.<sup>5</sup> An infant, as well as an adult, is entitled to relief from a judgment or order induced by fraud and collusion, and may therefore in equity impeach a decree for the sale of his lands by establishing that it was procured through the fraud and collusion of the administrator and guardian *ad litem* in concealing from the court the infant's interest in the land.<sup>6</sup>

§ 514. Where there is No Injury. — A proceeding in the courts of a sister state, confessedly illegal, out of which

<sup>1</sup> Harris v. Youman, 1 Hoff. Ch. 178; Knichenbeiser v. Beckert, 41 Ill. 173; Richmond v. Tayleur, 1 P. Wms. 734; Lloyd v. Malone, 23 Ill. 43; Wright v. Miller, 1 Sand. Ch. 103.

<sup>2</sup> Daniell's Chancery Practice, 205; Ralston v. Lahee, 8 Iowa, 23; 74 Am. Dec. 291; Allman v. Taylor, 101 Ill. 185.

<sup>3</sup> Joyce v. McAvoy, 31 Cal. 273; 89 Am. Dec. 172; Bennett v. Hamill, 2 Schoales & L. 575.

<sup>4</sup> Gwinn v. Williams, 30 Ind. 374; Wright v. Miller, 1 Sand. Ch. 103.

<sup>5</sup> L'Amoureux v. Crosby, 2 Paige, 422; 22 Am. Dec. 655.

<sup>6</sup> Griswold v. Hicks, 132 Ill. 494.

no injurious consequence is flowing, and which no attempt is made to enforce, cannot be made the foundation of an action in the courts of this state to have it declared void. This decision was made in New York upon an action brought there to annul a decree of divorce rendered in Michigan, without any service of process upon the husband, who was a resident of the former state. The relief was refused "because the matter can be ascertained to be illegal by reference to the books, as well as by getting the opinion of this court upon it."<sup>1</sup> In California, a judgment entered by default by a clerk in the absence of authority will not be restrained in equity, because the court can at any time, upon motion, arrest the process based upon such judgment.<sup>2</sup> If defendant failed to make a defense open to him because of a promise of the plaintiff which the latter has not kept, this is no ground for relief from the judgment, if the promise may still be enforced.<sup>3</sup>

§ 515. **Time to Apply.**—In Illinois, it has been held that in those cases where the service of process is constructive, and the law on that account allows a defendant a specified time to appear and have the judgment opened to make a defense on the merits, the time for prosecuting a bill of review or a writ of error does not run against the defendant until the judgment has been made final in fact as well as in form, by the lapse of the time granted him by statute in which to apply to set it aside.<sup>4</sup>

§ 516. **Complainant must do Equity — Relief Limited to the Wrong Done.**—The general rule that he who seeks equity must do equity is applicable to all complainants seeking relief from judgments against them. Courts of equity never interpose to wrest from any party any legal advantage he may have gained, without requiring his adversary to do complete justice, either by paying the

<sup>1</sup> *Hill v. Hill*, 28 Barb. 23.

<sup>2</sup> *Chipman v. Bowman*, 14 Cal. 157;  
*Sanchez v. Carriaga*, 31 Cal. 170.

<sup>3</sup> *Lumpkin v. Snook*, 63 Iowa, 515.

<sup>4</sup> *Lyon v. Robbins*, 46 Ill. 277.

amount due or by submitting to any other order of the court which may be necessary to adjust the rights of the parties with each other, according to fair dealing and good conscience.<sup>1</sup> And generally a complainant must not wait until equitable terms are imposed upon him by the court, but must aver either that he has offered to pay such sum or do such act as is just, or at least state his readiness to do so, and offer to comply with any decree which the court may deem equitable under the circumstances; and in many cases relief has been denied upon the ground that the complainant had neither done nor offered to do what his own allegations or proofs show he ought to do, before insisting upon the redress which he seeks.<sup>2</sup> Equity will not necessarily grant or refuse relief as to the whole judgment, but may restrain the enforcement of such part as may be inequitable and allow it to be executed as to the residue.<sup>3</sup>

<sup>1</sup> *Creed v. Scruggs*, 1 Heisk. 590; *Sloan v. Coolbaugh*, 10 Iowa, 31; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Tucker v. Holley*, 20 Ala. 426; *Williams v. Troy*, 39 Ala. 118; *Shelton v. Gill*, 11 Ohio, 417; *Byers v. Odell*, 56 Iowa, 618; *Wilson S. M. Co. v. Curry*, 126 Ind. 161.

<sup>2</sup> *Hale v. Bozeman*, 60 Miss. 965; *Booth v. Kesler*, 6 Gratt. 350; *Barrow v. Robichaux*, 14 La. Ann. 207; *Kamm v. Stark*, 1 Saw. 547.

<sup>3</sup> *Yonge v. Sheppard*, 44 Ala. 315;

## CHAPTER XXIII.

### JUDGMENTS OF COURTS NOT OF RECORD.

- § 517. Chief distinction.
- § 518. Whether jurisdiction can be shown *alimda*.
- § 519. Docket recitals.
- § 520. Justice's court.
- § 521. Service of process.
- § 522. Facts to authorize process.
- § 523. Cases where a court, board, or other tribunal may decide on its own jurisdiction.
- § 524. As conclusive as other judgments.
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- § 527. No presumptions of jurisdiction.
- § 528. Judgments against persons under common name.
- § 529. Ministerial officers acting under void judgments.
- § 530. Judicial officers acting without authority.
- § 531. Tribunals acting judicially.

§ 517. **Chief Distinction.** — The chief distinction between judgments pronounced by courts of record and those pronounced by courts not of record arises from the presumption of law that the former courts act within their jurisdiction, while, so far as jurisdiction is concerned, no presumption is indulged in favor of the latter. Whoever relies upon the judgment of a court of special jurisdiction must establish every fact necessary to confer jurisdiction upon the court.<sup>1</sup> The proceedings of all courts not of record must be shown to be within the powers granted to them by law, or such proceedings will be entirely disregarded. The acts of these two classes of courts have been properly likened to the acts of general agents and the acts of special agents. The former are to be regarded as valid in all cases to the extent that all persons relying upon them need show nothing beyond the

<sup>1</sup> Tucker v. Harris, 13 Ga. 1; 58 Am. Dec. 488; Lowry v. Erwin, 6 Rob. (La.) 192; 39 Am. Dec. 556; Palmer v. Oakley, 2 Doug. (Mich.) 433; 47 Am. Dec. 41; Horan v. Wahrenberger, 9 Tex. 313; 58 Am. Dec. 145; Cooper v. Sunderland, 3 Iowa, 114; 66 Am. Dec. 52; Smith v. Finley, 52 Ark. 373.

general grant of authority; while the latter, to be binding, must first be shown to fall within the limits of a special or restricted grant.<sup>1</sup> There is a further distinction in regard to the proceedings of these two classes of courts, arising from the fact that courts of special jurisdiction have no record, and therefore no unimpeachable memorial of their transactions. Any return or statement in relation to jurisdiction found among the papers, minutes, or other written matter kept by these courts seems to be but *prima facie* evidence; in opposition to which it may be shown, by any satisfactory means of proof, that the authority of the court did not extend over the matter in controversy, or over the parties to the suit.<sup>2</sup> Some expressions to be found in the opinions of the supreme court of California seem to support an exception to this rule. Thus when it was sought to collaterally impeach a judgment of a justice of the peace by showing that the defendant did not reside in the township in which the action was brought and in which the judgment was entered, it was answered that the return on the summons showed it to have been served in the county in which the action was brought, that this was sufficient proof to authorize the court to determine that it had jurisdiction over the defendant's person, and that the court "having upon sufficient evidence, as shown affirmatively by the record, obtained jurisdiction, it was not competent, in a collateral action, to disprove the existence of that jurisdiction."<sup>3</sup> While the decision of the case was correct, the reasoning on which it was based

<sup>1</sup> Clark v. Holmes, 1 Doug. (Mich.) 390; Sears v. Terry, 28 Conn. 273; Shufeldt v. Buckley, 45 Ill. 223; Stanton v. Styles, 5 Ex. 583; Gray v. McNeal, 12 Ga. 424; Harrington v. People, 6 Barb. 607; Taylor v. Bruscup, 27 Md. 219; O. & M. R. R. Co. v. Shultz, 31 Ind. 150; Thompson v. Multnomah Co., 2 Or. 34.

<sup>2</sup> Rowley v. Howard, 23 Cal. 401; Pardon v. Dwire, 23 Ill. 574; Sanborn v. Fellows, 22 N. H. 489; Corwin v. Merritt, 3 Barb. 343; People v. Cassels,

5 Hill, 164; Salladay v. Bainhill, 29 Iowa, 555; Barber v. Winslow, 12 Wend. 104; Jenks v. Stebbing, 11 Johns. 224; Sears v. Terry, 28 Conn. 273; Clark v. Holmes, 1 Doug. (Mich.) 400; Culver's Appeal, 48 Conn. 165; People's S. B. v. Wilcox, 15 R. I. 258; 2 Am. St. Rep. 894. See, however, Lightsey v. Harris, 20 Ala. 409; First National Bank v. Balcom, 35 Conn. 351.

<sup>3</sup> Gregory v. Bovier, 77 Cal. 121; Flagg v. Clements, 16 Cal. 389.

was not. The summons having confessedly been served upon the defendant, in the township in which he had been sued, the court unquestionably obtained jurisdiction over him, to the extent, at least, that it was his duty to appear before it and disclose any reason which might exist why it should not proceed to determine the cause. Failing to do this, he conceded the right of the court to proceed to judgment, and waived all question of its jurisdiction of his person, and could not in any subsequent action dispute this concession or withdraw this waiver.

§ 518. Jurisdiction, whether may be Shown *Aliunde*.—The necessity of affirmatively establishing the jurisdiction of courts of record by evidence *aliunde* can never arise, while the authority of those courts is always presumed. No doubt a case of actual jurisdiction might exist in an inferior court at the rendition of the judgment, without the evidence necessary to make the jurisdiction apparent in collateral proceedings being preserved among the records. Yet general expressions used in many cases indicate that when a judgment of a court not of record is offered in evidence for any purpose, it must appear *from inspection* of the records that jurisdiction existed.<sup>1</sup> These expressions were mainly, if not exclusively, made in reference to a state of facts out of which the question of supporting judgments of inferior courts by means of *aliunde* proof of jurisdictional facts could not arise. In California the question has been directly involved and decided in a decision in which the rule that jurisdiction must be apparent on the face of the proceedings was limited to those jurisdictional facts which the law directs the court to set forth on its records. Any other fact essential to jurisdiction may be established by evidence *aliunde*;<sup>2</sup> and this

<sup>1</sup> *Simons v. De Bore*, 4 Bosw. 554; *Miss*, 17; 75 Am. Dec. 49; *Anderson v. Ford v. Babcock*, 1 Denio, 158; *Frees*, 58 Tenn. 310; *King v. Bates*, 80 Mich. 267; 20 Am. St. Rep. 512; *Walker v. Moseley*, 5 Denio, 102; *Lowe v. Alexander*, 15 Cal. 296; *Root v. McFerrin*, 37

*Barron v. Dent*, 17 S. C. 75.  
<sup>2</sup> *Jolley v. Folts*, 34 Cal. 321.

position, while controverted in many of the states, and perhaps not yet sustained by the majority of the decisions upon the subject, is, in our judgment, supported by the better reasons and destined to gain adherents.<sup>1</sup>

§ 519. **Recital in Docket.**—The recital in the docket of a justice of the peace that “summons was returned duly served” is a mere conclusion of law, adding nothing to the effect of the officer’s return. That return is as much a part of the record as the docket. If it fails to show service, a recital in the docket based upon it cannot give validity to the judgment.<sup>2</sup> But if jurisdiction has been acquired by the due service of process, the statement in the justice’s docket that he waited until an hour designated before entering judgment by default is conclusive.<sup>3</sup>

§ 520. **Justices’ Courts.**—It seems to have been presumed at common law that justices of the peace proceeded lawfully and had acquired jurisdiction over the defendant, until the contrary appeared.<sup>4</sup> In some of the United States the records of justices are considered as entitled to the same absolute verity as the records of other courts; and no evidence is admitted to impeach them collaterally, though offered for the purpose of showing want of jurisdiction over the defendant.<sup>5</sup> In Massachusetts, “the rule which makes the judgment of a court of record binding upon the parties, until reversed by proper proceedings therefor, although jurisdiction of the person was not properly obtained, is applicable as well to a justice of the peace as to one of a court of general jurisdiction.”<sup>6</sup>

<sup>1</sup> *Liss v. Wilcoxon*, 2 Col. 35; *Behymer v. Nordloh*, 12 Col. 352; *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508; *Van Deuzen v. Sweet*, 51 N. Y. 285.

<sup>2</sup> *Lowe v. Alexander*, 15 Cal. 296.

<sup>3</sup> *Cory v. King*, 49 Iowa, 365.

<sup>4</sup> *Rex v. Venables*, 1 Strange, 630; *Rex v. Cleg*, 1 Strange, 475; *Rex v. Peckham*, Cart. 406; *Rex v. Clayton*, 3 East, 58.

<sup>5</sup> *Billings v. Russell*, 23 Pa. St. 191; 62 Am. Dec. 330; *Tarbox v. Hays*, 6 Watts, 398; 31 Am. Dec. 478; *Farr v. Ladd*, 37 Vt. 158; *Lightsey v. Harris*, 20 Ala. 411. A judgment rendered by a justice of the peace is not void because he failed to file the complaint; *Barber v. Kennedy*, 18 Minn. 216.

<sup>6</sup> *Hendrick v. Whittemore*, 105 Mass. 22.



§ 521. **Service of Process.**—To confer jurisdiction on a court not of record, the process must be properly served. A judgment founded on a service of process made by a constable having no authority to serve it is void.<sup>1</sup> So is a judgment founded upon a return signed "E. C., deputy sheriff," as the law does not recognize the act of a deputy sheriff, except for and in the name of his principal.<sup>2</sup> Where the return of the constable shows that the summons has been served in the township in which the suit was commenced, and the justice acting on such return enters judgment, such judgment cannot be collaterally avoided by showing that the defendant resided in another township;<sup>3</sup> but where the record fails to establish that the defendant was sued or served with summons in the proper township, a judgment by default is void.<sup>4</sup> In Texas it has been decided that the issuing and serving of the writ give a justice of the peace jurisdiction, and that therefore a judgment is not void though prematurely rendered before the time mentioned in the citation.<sup>5</sup> But a judgment by default, where the summons issued by a justice required less time for the defendant to appear than was provided by statute, has been adjudged to be void.<sup>6</sup> In Georgia it appears that a summons must be issued in all cases, and that the appearance of the defendant, in the absence of such summons, cannot give the court jurisdiction over him.<sup>7</sup> In our judgment, the decisions indicating that any irregularity in the form or service of process issued by a court not of record prevents the court from acquiring jurisdiction are incorrect. We have already shown that there is a material difference between want of jurisdiction and defects in acquiring jurisdiction; and

<sup>1</sup> Reynolds v. Orvis, 7 Cow. 269; Mallett v. Uncle Sam Co., 1 Nev. 189; Gallatian v. Cunningham, 8 Cow. 90 Am. Dec. 484.  
361.

<sup>2</sup> Rowley v. Howard, 23 Cal. 401; 157.  
Prickett v. Cleek, 13 Or. 415.

<sup>3</sup> Fagg v. Clements, 16 Cal. 389.

<sup>4</sup> Lowe v. Alexander, 15 Cal. 296;

<sup>5</sup> McNeill v. Hallmark, 28 Tex.

<sup>6</sup> Johnson v. Baker, 38 Ill. 98; 67

Am. Dec. 293.

<sup>7</sup> Jeffers v. Ware, 72 Ga. 135.

this difference we think to be equally important, whether the court is of record or not of record.<sup>1</sup>

§ 522. **Facts Authorizing Process.**— Sometimes certain facts are required to be proved to a court of limited jurisdiction as a ground for the issuing of process. In such case the tribunal must necessarily judge for itself upon the sufficiency of the proof offered. If there is any evidence, though slight and inconsiderable, having a legal tendency to prove the necessary facts, the process will be held valid until the action of the court in issuing it be set aside by some direct proceeding. But if there is an entire absence of proof, the process is void. In the one case there is a mere error of judgment; in the other, a want of every matter upon which the court is authorized to act.<sup>2</sup>

§ 523. **Decision of a Court, Board, or Other Tribunal as to its Own Jurisdiction.**— Whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack.<sup>3</sup> Thus where the surrogate in New York was empowered to appoint guardians for minors residing in the county wherein the court was held, and a petition was presented, stating that A. B. was such a minor and without any guardian, and upon the hearing of such petition evidence was given in relation to the residence of the minor, and an appointment thereupon made, it was subsequently considered that the

<sup>1</sup> *Keybers v. McComber*, 67 Cal. 395; *Dyckman v. Mayor of New York*, 5 N. Y. 434; *Agry v. Betts*, 12 Me. 415; *ante*, sec. 126.

<sup>2</sup> *Morrow v. Weed*, 4 Iowa, 77; 66 Am. Dec. 122.

<sup>3</sup> *Brittain v. Kinnsaird*, 1 Brod. & B. 432; *Betts v. Bagley*, 12 Pick. 572; *Martin v. Mott*, 12 Wheat. 19; *Vanderheyden v. Young*, 11 Johns. 150; *Evansville R. R. Co. v. Evansville*, 15 Ind. 421; *Wanzer v. Howland*, 10 Wis. 16; *Angel v. Robbins*, 4 R. I. 493;

*Dyckman v. Mayor of New York*, 5 N. Y. 434; *Agry v. Betts*, 12 Me. 415; *Low v. Dore*, 32 Me. 27; *Waterhouse v. Cousins*, 40 Me. 333; *People v. Hagar*, 52 Cal. 182; *Bonsell v. Leeth*, 14 Iowa, 309; *Ela v. Smith*, 5 Gray, 135; 66 Am. Dec. 359; *Porter v. Purdy*, 29 N. Y. 106; 86 Am. Dec. 283; *Wyatt v. Rambo*, 29 Ala. 519; 68 Am. Dec. 89; *Goodwin v. Sims*, 86 Ala. 102; 11 Am. St. Rep. 21.

jurisdictional fact of residence was thereby established, so that the appointment could not be collaterally assailed by proving that A B did not reside in the county.<sup>1</sup> Statutes are in force in many of the states under which boards of supervisors, or other local authorities, are authorized to direct certain public improvements to be done, and the expenses thereof to be charged against certain property, upon receiving a petition signed either by a designated number of persons, or by persons owning a designated amount of property. After a petition has been presented and acted upon, the work done or ordered to be done, and an assessment levied, the whole proceedings may be attacked on the ground that the petition was not signed by the requisite number of persons or the owners of the requisite amount of property; and if such is the case, and the attack is permissible, it is evident that the action of the board is absolutely void for want of jurisdiction. If from the statute under which action has been taken it is apparent that the board, or other authority to which the petition was presented, was required to ascertain and determine whether the petition was signed by the requisite number of persons or by the owners of the requisite amount of property, then the filing of a petition gives the board jurisdiction to proceed to determine whether it is properly signed, as well as every other fact necessary to the granting of the prayer of the petition. "And it is not necessary that the record of the board shall show an express finding upon such facts. Such finding will be presumed in support of the proceedings, if the record shows an order granting the petition, or for the taking of the steps necessary to the accomplishment of the end designed."<sup>2</sup> The only difficulty in cases of this class is in deciding whether the board to which the petition is presented is vested with authority to determine that it is

<sup>1</sup> *Lewis v. Dutton*, 8 How. Pr. 103. 371; *Comm'rs v. Aspinwall*, 21 How. Pr. 539; *Stoddard v. Johnson*, 75 Ind. 31; 539; *Bissell v. Jeffersonville*, 24 How. Pr. 287.  
<sup>2</sup> *Ela v. Smith*, 5 Gray, 135; 66 Am. Dec. 359; *Ricketts v. Spraker*, 77 Ind.

properly signed, or in other words, whether it is empowered to decide upon its own jurisdiction. This power need not be conferred in express terms. Thus if a street is authorized to be graded upon a petition therefor by the majority of the frontage of the lots and land fronting on the work proposed to be done, represented by the owners thereof or their agents, and the board receiving the petition is required to publish a notice of its intention to perform the work, and to thereafter make an order that it be done, and the property owners have a right to file objections to the ordering of the work, and to remonstrate against it, and the petition and remonstrance are required to be passed upon by the board, it is evident that the statute intends the board to pass upon all objections to the work, one of which may be that it has not been petitioned for by the requisite frontage of lots, and therefore that the determination of the board to order the work done is also a determination that the petition was sufficiently signed, and that such determination is conclusive, unless an appeal to some other tribunal is provided.<sup>1</sup> If, however, a local board or other tribunal is authorized to take certain action only upon the petition of a majority of the property owners within a certain district, and is not vested with authority to determine whether or not the petition is signed by the owners of the required amount of property, then its action may at any time be shown to have been without jurisdiction and void, by proving that the petition on which it acted was not so signed.<sup>2</sup>

When the proceedings of a board or other tribunal are required to be presented to some court or other tribunal for confirmation, or for the purpose of having their legality examined and determined, the proceeding for such

<sup>1</sup> *Spanuling v. Homestead Ass'n*, 87 Cal. 40; *Coloma v. Hayes*, 92 U. S. 484; *Venice v. Murdock*, 92 U. S. 494; *Matter of City of Buffalo*, 78 N. Y. 362; *Dampe v. Town of Dana*, 29 Wis. 419; *People v. Smith*, 55 N. Y. 135; *Sharp v. Spier*, 4 Hill, 87; *Kahn v.*

<sup>2</sup> *Mulligan v. Smith*, 59 Cal. 206; *Board of Supervisors*, 79 Cal. 388.

confirmation is not regarded as a collateral, but as a direct, attack, and the jurisdiction of the board or tribunal whose proceedings are presented for examination and confirmation must be shown affirmatively, though if such proceedings were drawn in question collaterally, such jurisdiction might be regarded as no longer open to inquiry.<sup>1</sup>

§ 524. **As Conclusive as Other Judgments.**—When a court of special jurisdiction, having authority to decide the matter in controversy, acquires jurisdiction over the parties to the suit, its judgment is final and conclusive, unless reversed by some appellate court. Such judgment cannot be overhauled or controverted in any original suit at law or in equity. Its merits can nowhere be collaterally investigated. No error, however palpable, will vitiate it.<sup>2</sup> “An inferior court having acquired jurisdiction, the same intendments will be made in its favor as in the case of superior courts.”<sup>3</sup> Courts not of record are like special agents; we “must see their authority” before regarding their decisions as lawful; but, seeing it, we are to respect it. Their authority is not the less certain because specified and confined.<sup>4</sup> “It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity.”<sup>5</sup>

<sup>1</sup> *Thorn v. Chicago Park Commissioners*, 130 Ill. 594; *In the Matter of the Bonds of Madera Irrigation District*, Supt. Ct. Cal., Dec. 12, 1891.

<sup>2</sup> *Bell v. Raymond*, 18 Conn. 100; *Shoemaker v. Brown*, 10 Kan. 383; *Relyea v. Ramsay*, 2 Wend. 602; *Roosevelt v. Kellogg*, 20 Johns. 208; *Bernal v. Lynch*, 36 Cal. 135; *Gees v. Shannon*, 2 Watts, 71; *Dakin v. Hudson*, 6 Cow. 221; *Sheldon v. Wright*, 5 N. Y. 497; *Mitchell v. Hawley*, 4 Denio, 414; 47 Am. Dec. 280; *Woodruff v. Cook*, 2 Edw. Ch. 262; *Reid v. Spoon*, 66 N. C. 415; *Durham v. Wilson*, 104 N. C. 595; *Marsteller v. Marsteller*, 132 Pa. St. 517; 19 Am. St. Rep. 604;

*Hendrickson v. St. Louis R. R. Co.*, 34 Mo. 188; 84 Am. Dec. 76; *Kase v. Best*, 15 Pa. St. 101; 53 Am. Dec. 573; *Ludwick v. Fair*, 7 Ired. 422; 47 Am. Dec. 333; *Spaulding v. Chamberlain*, 12 Vt. 538; 36 Am. Dec. 358; *Burke v. Elliott*, 4 Ired. 355; 42 Am. Dec. 142; *Wiese v. San Francisco M. F. S.*, 82 Cal. 645; *Reed v. Whitten*, 78 Ind. 579; *State v. Six*, 80 Mo. 61.

<sup>3</sup> *Thompson v. Multnomah County*, 2 Or. 34.

<sup>4</sup> *McKensie v. Ramsay*, 1 Bail. 457.

<sup>5</sup> *Grunsenmeyer v. Logansport*, 76 Ind. 549; *Dore v. Dougherty*, 72 Cal. 232; 1 Am. St. Rep. 48.

The jurisdiction appearing, the same presumption of law arises, that it was rightly exercised, as prevails with reference to the action of a court of superior and general authority."<sup>1</sup>

§ 525. **Want of Jurisdiction Makes Void.**—A limited tribunal taking upon it the exercise of jurisdiction not belonging to it, its decision is a nullity, from which there need not be an appeal.<sup>2</sup> A judgment of a justice in a sum exceeding his jurisdiction is void.<sup>3</sup>

§ 526. **Adjournment without Day.**—A justice who adjourns a cause without specifying the hour of the day or the place to which it is adjourned thereby loses jurisdiction over the parties, and a judgment subsequently rendered by him is invalid.<sup>4</sup>

§ 527. **No Presumptions of Jurisdiction.**—As nothing can be presumed in favor of the jurisdiction of a justice of the peace, the matters requisite to authorize service of summons by publication must affirmatively appear. If the statute provides that before ordering summons to be published it must appear that plaintiff has a good cause of action, and the only showing on the subject is an affidavit stating in general terms "that a good cause of action exists," this is insufficient, and the judgment procured thereby is a nullity.<sup>5</sup> And generally, the judgment of a court of special and limited jurisdiction must be disregarded, unless the facts necessary to support such jurisdiction are established affirmatively.<sup>6</sup>

<sup>1</sup> *Comstock v. Crawford*, 3 Wall. 396; *Long v. Burnett*, 13 Iowa, 28; 81 Am. Dec. 420; 15 Iowa, 213.

<sup>2</sup> *Attorney-General v. Lord Rotham*, 1 Turn. & R. 219; *Briscoe v. Stephens*, 2 Bing. 213.

<sup>3</sup> *Jones v. Jones*, 3 Dev. 360; *Hinds v. Willis*, 13 Serg. & R. 213.

<sup>4</sup> *Crandall v. Bacon*, 20 Wis. 639; 91 Am. Dec. 451.

<sup>5</sup> *Little v. Currie*, 5 Nev. 90; *Forbes v. Hyde*, 31 Cal. 353; *Ricketson v. Richardson*, 26 Cal. 153.

<sup>6</sup> *Beach v. Botsford*, 1 Doug. (Mich.) 199; 40 Am. Dec. 45; *Hall v. Howd*, 10 Conn. 514; 27 Am. Dec. 696; *Henry v. Estes*, 127 Mass. 474; *Newman v. Manning*, 89 Ind. 422; *Crawford v. Howard*, 30 Mo. 422; *Fahey v. Motter*, 67 Md. 250.

§ 528. **Judgments against Persons under Common Name.**—When two or more persons are associated in business, in California, under a common name, the statute authorizes suit to be brought against them in such name. Under this statute complaint was filed against the "Independent Company." The summons was issued against the Independent Tunnel Company, and was returned served on R., a member of the Independent Company. Judgment entered against the Independent Tunnel Company was held to be void, on the ground that the record failed to show any suit or service on the last-named company.<sup>1</sup>

§ 529. **Officers Acting under Void Judgment.**—Questions in regard to the responsibility of officers for acts done by virtue of process issued upon void judgments arise more frequently out of the proceedings of courts not of record than out of proceedings in the higher courts. A void judgment entered in one of the inferior courts has, no doubt, sometimes been treated as incapable of being a justification for any act done under it, either by the parties or by any officer of the court.<sup>2</sup> But the general rule seems now to be almost universally acknowledged and enforced, that an officer, acting under process regular and valid on its face, and issued by a court which might lawfully exercise jurisdiction over the subject-matter of the action, is protected, although the court had no jurisdiction over the defendant, unless the officer had notice of that fact.<sup>3</sup> It is said that when want of juris-

<sup>1</sup> King v. Randlett, 33 Cal. 318.

<sup>2</sup> Yates v. Lansing, 9 Johns. 424; 6 Am. Dec. 290; Terry v. Huntington, Hardr. 480; Case of the Marshalsea, 10 Coke, 68; Wise v. Withers, 3 Cranch, 331; Mills v. Martin, 19 Johns. 36; Woodward v. Paine, 15 Johns. 493.

<sup>3</sup> Harmon v. Gould, 1 Wright, 709; Taylor v. Alexander, 6 Ohio, 145; Coon v. Congden, 12 Wend. 496; Sheldon v. Van Buskirk, 2 N. Y. 473; Dominick v. Eacker, 3 Barb. 19; Noble v. Holmes, 5 Hill, 194; Harget v.

Blackshear, Tayl. 107; Damon v. Bryant, 2 Pick. 411; Clay v. Caperton, 1 T. B. Mon. 10; 15 Am. Dec. 77; Cornell v. Barnes, 7 Hill, 35; McLean v. Cook, 23 Wis. 364; Dynes v. Hoover, 20 How. 65; McDonald v. Wilkie, 13 Ill. 22; 54 Am. Dec. 423; Shaw v. Davis, 55 Barb. 389; Whipple v. Kent, 2 Gray, 410; 61 Am. Dec. 470; Churchill v. Churchill, 12 Vt. 661; Miller v. Grice, 1 Rich. 147; State v. Crow, 11 Ark. 642; Higdon v. Conway, 12 Mo. 293; Camp v. Mosely, 2 Fla. 171; Campbell

diction arises from a fact of public notoriety which may legally be presumed to be in the officer's knowledge, he is not protected by his process.<sup>1</sup> No doubt an officer acting under process issued in a case of which the court could not, in any circumstances, acquire jurisdiction, is liable as a trespasser.<sup>2</sup> Where a writ is regular on its face, but is nevertheless issued in a case in which the court did not have jurisdiction over the person or the subject-matter, it is doubtful whether an officer acting under it can be made liable by showing that he had actual knowledge of the facts on account of which the judgment must be regarded as void. Perhaps the majority of the decisions upon this subject refuse to permit any inquiry concerning the knowledge of the officer, unless it is such as might be obtained from inspecting the writ.<sup>3</sup>

§ 530. **Judicial Officers Acting without Authority.**—While judicial officers, whether of superior or of inferior courts, are not responsible for any errors of judgment made by them while acting within their jurisdiction,<sup>4</sup> they are, when assuming to act beyond the scope of their authority, responsible as trespassers.<sup>5</sup> If a complaint

*v. Webb*, 11 Md. 471. This question is considered at length, and the authorities thereon collected, in *Savacool v. Boughton*, 5 Wend. 170, and the note thereto, 21 Am. Dec. 181, 190; *Freeman on Executions*, secs. 101, 102.

<sup>1</sup> *Batchelder v. Currier*, 45 N. H. 460; *Parker v. Wallrod*, 16 Wend. 514; 30 Am. Dec. 124.

<sup>2</sup> *Howard v. Clark*, 43 Mo. 344.

<sup>3</sup> *Webber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440; *Gott v. Mitchell*, 7 Blackf. 270; *Watson v. Watson*, 9 Conn. 240; 23 Am. Dec. 324; *Tierney v. Frazier*, 57 Tex. 437. *Contra*, *Sprague v. Birchard*, 1 Wis. 457; 60 Am. Dec. 393; *McDonald v. Wilkie*, 13 Ill. 22; 54 Am. Dec. 423; *Grace v. Mitchell*, 31 Wis. 533; 11 Am. Rep. 613; *Leachman v. Dougherty*, 81 Ill. 324; *Batchelder v. Currier*, 45 N. H. 460.

<sup>4</sup> *Miller v. Seare*, 2 Black, 1141; *Yates v. Lansing*, 9 Johns. 424; 6 Am. Dec. 303; *Phelps v. Sill*, 1 Day, 315;

*Lining v. Bentham*, 2 Bay, 1; *Bushell's Case*, 1 Mod. 119; *Hamond v. Howell*, 1 Mod. 184; 2 Mod. 218; *Downing v. Herrick*, 47 Me. 462; *Doswell v. Impsey*, 1 Barn. & C. 163; *Ela v. Smith*, 5 Gray, 135; 66 Am. Dec. 356; *Burnham v. Stevens*, 33 N. H. 247; *Moor v. Ames*, 3 Caines, 170; *Butler v. Potter*, 17 Johns. 145; *Friend v. Hamill*, 34 Md. 298; *McClure v. Gulf R. R. Co.*, 9 Kan. 382; *Little v. Moore*, 4 N. J. L. 75; 7 Am. Dec. 574; *Gregory v. Brown*, 4 Bibb, 28; 7 Am. Dec. 731; *Jones v. Hughes*, 5 Serg. & R. 298; 9 Am. Dec. 364; *Reid v. Hood*, 2 Nott & McC. 168; 10 Am. Dec. 582; *Cunningham v. Bucklin*, 8 Cow. 178; 18 Am. Dec. 432.

<sup>5</sup> *Blood v. Sayre*, 17 Vt. 609; *Houlton v. Smith*, 14 Ad. & E., N. S., 841; *Pease v. Chaytor*, 1 Best & S. 658; *Revill v. Pettit*, 3 Met. (Ky.) 314; *Cohon v. Speed*, 2 Jones, 133; *Knowles v. Davis*, 2 Allen, 61; *Piper v. Pearson*, 2 Gray, 120; 61 Am. Dec. 438; *Wise v. Withers*, 3 Cranoh, 331;



states facts sufficient to give jurisdiction to a judicial officer with whom it is filed, he is not responsible for any acts done under it, though it afterward appears that the complaint is untrue, and that the jurisdictional averments therein are false.<sup>1</sup> The liability of a judicial officer must, we apprehend, depend upon whether he may be regarded as having acted in good faith in what he did. If it is clear that he had no jurisdiction of the subject-matter, or if, having jurisdiction of the subject-matter, there was nothing which might fairly lead him, as an ordinarily intelligent and prudent judge, to believe that he had jurisdiction of the party against whom he proceeded, he may be held answerable.<sup>2</sup> But he is not answerable for honest errors of judgment, even upon jurisdictional questions.<sup>3</sup> If he exceeds his jurisdiction, with cognizance of the facts constituting the excess, he is answerable as a trespasser.<sup>4</sup> If a judge acts within his jurisdiction, he is certainly not liable for any errors of judgment,<sup>5</sup> and it is doubtful whether he may be made answerable by charging him with acting upon improper motives.<sup>6</sup> A justice of the peace who enters judgment and issues execution against a defendant not served with summons, there being no return showing such service, and no appearance by defendant, is liable as a trespasser for acts done under the execution.<sup>7</sup>

§ 531. **Tribunals Acting Judicially.** — We have shown in this chapter that the decisions of courts not of record

*Atkins v. Brewer*, 3 Cow. 206; 15 Am. Dec. 264; *Flack v. Harrington*, Breese, 213; 12 Am. Dec. 170; *Kelly v. Rembert*, Harp. 65; 18 Am. Dec. 643; *Grunmon v. Raymond*, 1 Conn. 40; 6 Am. Dec. 200; *State v. Flinn*, 9 Blackf. 72; 23 Am. Dec. 380; *Rogers v. Mulliner*, 6 Wend. 597; 22 Am. Dec. 546.

<sup>1</sup> *Lowther v. Earl of Radnor*, 8 East, 113.

<sup>2</sup> *Piper v. Pearson*, 2 Gray, 120; 61 Am. Dec. 438; *Barkeloo v. Randall*, 4 Blackf. 476; 32 Am. Dec. 46; *Borden v. State*, 11 Ark. 519; 54 Am. Dec. 217.

<sup>3</sup> *Busteed v. Parsons*, 54 Ala. 303; 25 Am. Rep. 688.

<sup>4</sup> *Clarke v. May*, 2 Gray, 410; 61 Am. Dec. 470.

<sup>5</sup> *Bailey v. Wiggins*, 5 Harr. (Del.) 462; 60 Am. Dec. 650.

<sup>6</sup> *Pratt v. Gardner*, 2 Cush. 63; 48 Am. Dec. 652; *Stone v. Graves*, 8 Mo. 148; 40 Am. Dec. 131. *Contra*, *Stewart v. Cooley*, 23 Minn. 347; 23 Am. Dec. 690.

<sup>7</sup> *Inos v. Winspear*, 18 Cal. 397; *Tobin v. Addison*, 2 Strob. 3.

are conclusive upon all questions which such courts have jurisdiction to decide,<sup>1</sup> and that the judges of such courts, like those of higher judicial tribunals, may decide upon all matters properly before them, without the danger of being made responsible for any errors of judgment.<sup>2</sup> A large number of persons and of tribunals, not ordinarily spoken of as "judges," nor as "courts," are nevertheless authorized to investigate and determine certain questions. Their authority in this respect is judicial; and their determinations are conclusive, until set aside by some competent authority. They cannot be made liable for errors in deciding. Their jurisdiction, like that of other courts not of record, must always be affirmatively shown, to impart validity to their decisions. As a general rule, whenever any person or persons have authority to hear and determine any question, their determination is, in effect, a judgment having all the incidents and properties attached to a similar judgment pronounced in any regularly created court of limited jurisdiction acting within the bounds of its authority. Hence whenever any board, tribunal, or person is by law vested with authority to decide a question, such decision, when made, is *res judicata*, and as conclusive of the issues involved in the decision as though the adjudication had been made by a court of general jurisdiction.<sup>3</sup> The decisions of the following officers, boards, and tribunals have therefore been treated as precluding any further inquiry respecting the questions decided: Judges, commissioners, or other officers authorized to allow or reject claims made against the estates of decedents<sup>4</sup> or of insolvents,<sup>5</sup> or against counties,<sup>6</sup>

<sup>1</sup> See post, secs. 523, 524.

<sup>2</sup> See post, sec. 530.

<sup>3</sup> *Rounds v. P. & S. S. S. Co.*, 14 B. L. 344; *Longfellow v. Quimby*, 29 Ma. 196; 48 Am. Dec. 525; *Kelly v. Wimberly*, 61 Miss. 548; *State v. Minneapolis E. R'y Co.*, 40 Minn. 15; *Barke v. Ferry*, 26 Neb. 414. But decisions of local boards or tribunals cannot be received as conclusive, when the party affected was not given any

opportunity to be heard: *Verner v. Bosworth*, 28 Kan. 670; *Wilcox v. Johnson*, 34 Kan. 655.

<sup>4</sup> *Voaler v. Brock*, 84 Mo. 574.

<sup>5</sup> *Lomas v. Hilliard*, 60 N. H. 108; *Hartford F. N. B. v. Hartford L. I. Co.*, 45 Conn. 23; *Hutton v. Lockridge*, 22 W. Va. 159.

<sup>6</sup> *Jackson Co. v. Applewhite*, 62 Ind. 464; *Campbell v. Monroe County*, 71 Ind. 185.

boards of supervisors, county commissioners, or other local bodies;<sup>1</sup> board of pilot commissioners;<sup>2</sup> benevolent and other associations determining questions involving the rights of their members;<sup>3</sup> commissioners appointed to decide whether an execution should run against the body of the defendant;<sup>4</sup> college orders;<sup>5</sup> ecclesiastical courts,<sup>6</sup> and other ecclesiastical tribunals;<sup>7</sup> inspectors of elections passing on qualifications of person offering to vote;<sup>8</sup> mayor of city deciding whether to call out the military to suppress a riot;<sup>9</sup> courts-martial and other military courts;<sup>10</sup> register and receiver of United States land-office, and other officers to whom is committed the duty of hearing and determining issues arising in the management and disposition of the public lands, whether of the United States or of a state;<sup>11</sup> steward of court-baron;<sup>12</sup> vicar-general of a bishop;<sup>13</sup> commissioner of patents;<sup>14</sup> comptroller of currency declaring the individual

<sup>1</sup> *Lawrence Co. v. Hall*, 70 Ind. 469; *Humphreys v. Woodstown*, 48 N. J. L. 588; *Cox v. Bird*, 87 Ind. 142; *People v. Carter*, 119 N. Y. 557; *Maxwell v. Board of Comm'rs*, 119 Ind. 20; *People v. Supervisors*, 10 Cal. 344; *Shively v. Welch*, 20 Fed. Rep. 28; *Stone v. Augusta*, 46 Me. 127; *Lincoln Co. v. Simmons*, 39 Ark. 485; *State v. Nelson*, 21 Neb. 572; *Strieb v. Cox*, 111 Ind. 299.

<sup>2</sup> *Downer v. Lent*, 6 Cal. 94; 65 Am. Dec. 489.

<sup>3</sup> *Black and Whitesmiths' Society v. Vandyke*, 2 Whart. 309; *Anacosta Tribe v. Murbach*, 13 Md. 91; 71 Am. Dec. 625; *Commonwealth v. Pike Ben. Soc.*, 8 Watts & S. 247.

<sup>4</sup> *Howe v. Newbegin*, 34 Me. 151.

<sup>5</sup> *Rex v. Grondon*, 1 Cowp. 315.

<sup>6</sup> *Watson v. Garvin*, 54 Mo. 353.

<sup>7</sup> *Connitt v. Reformed Church*, 54 N. Y. 551; *Church v. Witherell*, 3 Paige, 296; *Gable v. Miller*, 10 Paige, 627; *German Ref. Church v. Seibert*, 3 Pa. St. 291; *Shannon v. Frost*, 3 B. Mon. 258; *Forbes v. Eden*, L. R. 1 Sc. & Div. App. 618; *Chase v. Cheney*, 53 Ill. 509.

<sup>8</sup> *Gordon v. Farrar*, 2 Doug. (Mich.) 411; *Brevard v. Hoffman*, 18 Md. 479.

<sup>9</sup> *Ela v. Smith*, 5 Gray, 135; 66 Am. Dec. 356.

<sup>10</sup> *Dynes v. Hoover*, 20 How. 65; *Hefferman v. Porter*, 6 Cold. 391; 98 Am. Dec. 459; *In re Bogart*, 5 Pa. L. Rep. (U. S. C. C.) 125; *In re White*, 17 Fed. Rep. 723; *Brown v. Wadsworth*, 15 Vt. 170; 40 Am. Dec. 674; *Chesterfield v. Perkins*, 53 N. H. 573; *Keyes v. U. S.*, 109 U. S. 336; *Wait v. Thomasson*, 10 Heisk. 151.

<sup>11</sup> *McConnell v. Wilcox*, 1 Scam. 344; *Boatner v. Ventress*, 8 Martin, N. S. 644; 20 Am. Dec. 266; *Comegys v. Vasa*, 1 Pet. 212; *Chever v. Horner*, 11 Cal. 68; 7 Am. St. Rep. 217; *Lytle v. Arkansas*, 9 How. 333; *Johnson v. Towley*, 13 Wall. 72; *Wilcox v. Jackson*, 13 Pet. 511; *Shepley v. Cowan*, 91 U. S. 340; *Moore v. Robbins*, 96 U. S. 635. The circumstances under which relief in equity may be had from these decisions are discussed in the note to 20 Am. Dec. 266, and in U. S. v. Minor, 114 U. S. 233; *Tate v. Carney*, 24 How. 357; *U. S. v. Throckmorton*, 96 U. S. 61; *Smelting Co. v. Kemp*, 104 U. S. 636; *Moffatt v. U. S.*, 112 U. S. 34.

<sup>12</sup> *Holroyd v. Brears*, 2 Barn. & Ald. 473.

<sup>13</sup> *Ackerly v. Parkinson*, 3 Maule & S. 411.

<sup>14</sup> *Eureka Co. v. Bailey*, 11 Wall. 488; *Rubber Co. v. Goodyear*, 9 Wall. 788.

liability of stockholders of an insolvent national banking association;<sup>1</sup> probate judge in making a grant of town-site lands.<sup>2</sup> It is true that the jurisdiction of these tribunals is rarely presumed, and must generally be affirmatively established.<sup>3</sup> When so established, a mere error or irregularity in its exercise cannot make the final decision void, nor subject it to collateral attack.<sup>4</sup> There are many instances in which it is the duty of an officer or board to make inquiry concerning a jurisdictional fact, and not to proceed unless it is found to exist. Where such is the case, an express finding of the fact, or a finding implied from proceeding as though such fact had been ascertained to exist, is generally conclusive, and the ultimate decision cannot be avoided by showing that such fact did not exist.<sup>5</sup>

<sup>1</sup> *Casey v. Galli*, 94 U. S. 673; *Kennedy v. Gibson*, 8 Wall. 498.

<sup>2</sup> *Ming v. Foote*, 9 Mont. 201; *Chever v. Horner*, 11 Col. 68; 7 Am. St. Rep. 217.

<sup>3</sup> *Commonwealth v. German Society*, 15 Pa. St. 251; *Delacy v. Neuse Navigation Co.*, 1 Hawks, 274; 9 Am. Dec. 636; *Wash. Ben. Soc. v. Baehner*, 20 Pa. St. 425; *Innes v. Wylie*, 1 Car. & K.

257; *Queen v. Saddler's Co.*, 10 H. L. Cas. 404; 9 Jur. N. S. 1681; 32 L. J. Q. B. 337; 11 W. R. 1004.

<sup>4</sup> *Logansport v. La Rosa*, 99 Ind. 117.

<sup>5</sup> *Ante*, sec. 523; *Spaulding v. Homestead Ass'n*, 87 Cal. 40; *People v. Hagar*, 52 Cal. 182; *Weir v. State*, 93 Ind. 311; *Heagg v. Block*, 90 Ind. 534.

## CHAPTER XXIV.

## OF JUDGMENTS BY DEFAULT.

- § 532. Effect.
- § 533. Entry by clerk without authority.
- § 534. Erroneously entered by clerk.
- § 535. Disqualification of judge does not disqualify clerk.
- § 536. Entry by the court.
- § 537. On appeal, no presumptions of jurisdiction.
- § 538. Whether an appeal lies.
- § 539. On good and bad counts.
- § 540. Errors reviewable on appeal.
- § 541. Opening.
- § 542. Terms imposed.

§ 532. **Effect of.**—The effect of a valid judgment by default remaining unvacated and unreversed is generally conceded to be the same as though it had resulted from the trial of issues formed by appropriate pleadings on the part both of the plaintiff and of the defendant. The decisions sustaining this statement, as well as the few tending to controvert or modify it, are cited under various heads in this book, and therefore need not be reproduced in this place.<sup>1</sup> The vacating or enjoining of a judgment by default is governed by the same rules and must be supported by the same cause which would be sufficient to warrant the vacating or enjoining of any other judgment.<sup>2</sup> When entered by a court having jurisdiction, a judgment by default cannot be collaterally avoided for irregularity or error.<sup>3</sup> When the entry is premature, the defendant not yet being in default, there are authorities which speak of the judgment as being void;<sup>4</sup> but they are doubtless inaccurate in expression,<sup>5</sup> and probably not intended to

<sup>1</sup> See *ante*, sec. 330, 331.

<sup>2</sup> *Sohier v. Merrill*, 3 Wood. & M. 179; *Faulkner v. Campbell*, Morris, 148; *Mason v. Richards*, 3 Gilm. 25.

<sup>3</sup> *Betts v. Baxter*, 58 Mo. 334; *Bell v. Van Zandt*, 54 Tex. 150; *Holt v. Thacher*, 52 Vt. 592; *Frankfurth v. Anderson*, 61 Wis. 107; *Genobles v. West*, 23 S. C. 154; *Lawrence v. How-*

*ell*, 52 Iowa, 62; *McPherson v. Beatrice Bank*, 12 Neb. 202; *Granger v. Detroit S. C. J.*, 44 Mich. 384.

<sup>4</sup> *Yentzer v. Thayer*, 10 Col. 63; 3 Am. St. Rep. 563.

<sup>5</sup> *Harper v. Biles*, 115 Pa. St. 594; *Mitchell v. Aten*, 37 Kan. 33; 1 Am. St. Rep. 231; *Ballinger v. Tarbell*, 16 Iowa, 491; 85 Am. Dec. 527.

assert anything except that the court proceeding prematurely will, if applied to within a reasonable time, set aside the judgment and give the defendant the hearing to which he was entitled. If, however, the statute authorizing the constructive service of process declares that "no judgment shall be entered at the return term," unless on personal service on the defendant, perhaps a judgment entered at such term, when supported only by the constructive service of process, is absolutely void.<sup>1</sup> A judgment by default will be presumed to have been properly entered, when there is nothing in the record inconsistent with such presumption.<sup>2</sup> Hence it cannot be avoided on the ground that no order directing its entry appears on the minutes or records of the court.<sup>3</sup>

The provisions of the various state constitutions guaranteeing the right of trial by jury apply only when there are issues to be tried, and do not invalidate statutes authorizing the entry of judgments by default and the assessment of damages by the court without the intervention of a jury.<sup>4</sup>

§ 533. **Entry by Clerk without Authority.**—Judgments may be entered after default, either by the clerk of the court acting ministerially, or by the court acting judicially. "The clerk derives all his powers from the statute, and as they are special, no intendments are to be made in support of his act, but in each case it must appear that what he did was within the authority conferred on him by the statute; and whether the act done by him be considered as purely ministerial or of a mixed nature, partaking of elements both ministerial and judicial, is of no practical importance. The question is, Had he authority to enter the defendant's default and there-

<sup>1</sup> *Betts v. Barter*, 58 Miss. 329.

<sup>2</sup> *Evans v. Young*, 10 Col. 316; 3 Am. St. Rep. 583; *Fogg v. Gibbs*, 8 Bart. 464.

<sup>3</sup> *Harvey v. Walsh*, 38 Minn. 521; 3 Am. St. Rep. 689.

<sup>4</sup> *Seeley v. Bridgeport*, 53 Conn. 1; *Dartie v. Lockwood*, 61 Ga. 293; *Hunt v. Lucas*, 99 Mass. 404; *Lawrance v. Borm*, 86 Pa. St. 225; *Cureton v. Stokes*, 22 S. C. 583.

upon judgment final against him as the case stood at that time?"<sup>1</sup> If this question is answered in the negative, or in other words, if the clerk had no authority to enter the default, or if, having authority to enter the default, he had no authority to enter judgment thereon, then any judgment entered by him without the direction of the court is void.<sup>2</sup>

§ 534. **Erroneously Entered by Clerk.**—But it may happen that, though the authority of the clerk to act is conceded, he proceeds to exercise this authority erroneously. The question then arises, "Is the judgment void so as to be an absolute nullity, incapable of enforcement? or is it simply an erroneous judgment which may be enforced until modified on motion made in the proper manner at the proper time, or on appeal from the judgment? In such case we do not think the judgment would be absolutely void in consequence of an error of the clerk in determining the amount. It would be an error committed in the performance of an act within his jurisdiction to perform, which could be corrected on motion made in time or on appeal, but which would not vitiate the judgment if not corrected. There is no want of jurisdiction over the subject-matter, but only an error in its exercise. Until modified or reversed, the judgment was valid."<sup>3</sup>

§ 535. **Disqualification of Judge.**—The entry of a default by the clerk being a ministerial act, "the disqualification of the judge or his court to try or render judgment in the case does not disqualify the clerk from performing this ministerial act."<sup>4</sup>

<sup>1</sup> *Providence Tool Co. v. Prader*, 32 Cal. 634; 91 Am. Dec. 598.

<sup>2</sup> *Stearns v. Aguirre*, 7 Cal. 443; *Chipman v. Bowman*, 14 Cal. 157; *Kelly v. Van Austin*, 17 Cal. 564; *Glidden v. Packard*, 28 Cal. 649; *Willson v. Cleveland*, 30 Cal. 192; *Curry v. Roundtree*, 51 Cal. 184; *Blount v.*

*Gallaher*, 22 Fla. 92. The entry of judgments by default except in open court is prohibited by the statutes of South Carolina: *Adams v. Agnew*, 15 S. C. 36.

<sup>3</sup> *Bond v. Pacheco*, 30 Cal. 530.

<sup>4</sup> *People v. De Carrillo*, 35 Cal. 37.

§ 536. **Entry by the Court.**— The entry of judgment upon default by the court, acting by its clerk, being the exercise of judicial authority, is liable to be questioned collaterally, if from the record want of jurisdiction over the subject-matter of the action, or over the person of the defendant, is apparent; to be reversed upon appeal for any errors in the exercise of established jurisdiction; and to be vacated in the court wherein it was entered for irregularities in the proceedings, or in the absence of such irregularities, in order to permit of the production of meritorious defenses. The law in regard to collateral attacks founded upon jurisdictional defects has already been considered in the chapter upon inquiries in regard to jurisdiction. We shall therefore confine this chapter to a brief statement of the matters sufficient to occasion the reversal of a judgment by default, when made the subject of review in an appellate tribunal, and of the facts warranting a vacation of the judgment in the court wherein it was entered.

§ 537. **Jurisdiction not Presumed on Appeal.**— On appeal, presumptions in regard to the regular acquisition of jurisdiction over the defendant in the court below do not exist. If the record fails to show that jurisdiction has been obtained, the judgment will be reversed.<sup>1</sup> Thus if the return on the summons is signed by A B, under-sheriff, it is a nullity, because the court cannot recognize the act of a deputy or under-sheriff, except when done in the name and as the act of his principal. For this reason, the judgment founded upon such return will be reversed.<sup>2</sup> The same action will be taken by an appellate court where, though service is shown, the summons is radically defective.<sup>3</sup> A judgment by default against two defendants, only one of whom has been summoned, is erroneous, and will be reversed as to both when the cause of action is joint.<sup>4</sup> If a judgment by default is entered

<sup>1</sup> *Schloss v. White*, 16 Cal. 65.

<sup>2</sup> *Joyce v. Joyce*, 5 Cal. 449.

<sup>3</sup> *State v. Woodlief*, 2 Cal. 241;

*Porter v. Hermann*, 8 Cal. 625.

<sup>4</sup> *Winalow v. Lambard*, 57 Me. 356.



for failure to answer after a demurrer to the complaint has been overruled, and it recites that the time allowed by the court for answering has expired, the presumption will be indulged, even upon appeal, that the trial court, "before ordering entry of the judgment, had satisfactory evidence that the time for answering had expired."<sup>1</sup>

§ 538. **Whether Appeal Lies for Defects in the Complaint.**—When process is served, it is incumbent on the defendant to appear and to disclose his defense; but a difference of opinion exists in regard to the necessity of his appearing and objecting by demurrer to a complaint which is so radically defective as to disclose no cause of action against him. On one hand, it is insisted that if the defendant neglects to adopt his remedy of demurring to the complaint, because it does not state facts sufficient to constitute a cause of action, he cannot sustain an appeal.<sup>2</sup> On the other hand, and especially in California, judgments by default are held to be proper subjects of appeal, and are reversed when the complaints on which they are based do not state matters sufficient to constitute a cause of action. The default, it is reasonably suggested, does not admit any fact which the plaintiff has not thought proper to allege.<sup>3</sup>

The rule adopted by the supreme court of California and the reason for its adoption were thus stated by Justice Sanderson: "Nor is there any force in the idea that a distinction is to be made between cases which were once denominated cases at law and cases which were once called cases in equity, and that on appeal from judgments by default this court will review errors in the latter cases, and not in the former. There is matter in some of the cases cited by respondents which gives color to such an

<sup>1</sup> *Cantanich v. Hayes*, 52 Cal. 333.

<sup>2</sup> *Jones v. Kip*, 1 Code Rep. 119; *Adams v. Oaks*, 20 Johns. 282; *Pope v. Dinsmore*, 8 Abb. Pr. 429; *Dorr v. Birge*, 8 Barb. 351; *Colden v. Knick-*

*erbacker*, 2 Cow. 31; *Dean v. Abel*, 1 Dick. 287.

<sup>3</sup> *Abbe v. Marr*, 14 Cal. 210; *Barroa v. Frink*, 30 Cal. 486; *Choynski v. Cohen*, 39 Cal. 501; 2 Am. Rep. 476; *Childress v. Mann & Co.*, 33 Ala. 206.

idea; but we say of them, as we have said of the others, there is no foundation for the distinction. Nor is there any force in the suggestion that this court will exercise original instead of appellate jurisdiction if it entertains the points made in this appeal. It is true that as a matter of fact the court below has never passed upon the sufficiency of the complaint, yet it is equally true that as a matter of law it has. Though entered by the clerk without the direction of the judge, it is as much the judgment of the court as if it had been announced from the bench, and the defendants are as much entitled to the opinion of this court upon the sufficiency of the complaint as they would have been had they appeared and demurred. Questions of jurisdiction and of the sufficiency of the complaint, upon the point whether the facts stated constituted a cause of action, are never waived in any case, and may be made for the first time in this court. The idea which finds countenance in some of the cases cited by the respondents, that at all events this court will deal more liberally with judgments by default than with others, and will pass over errors for which it would reverse a judgment rendered upon a trial, we here take occasion to say is without foundation. It is true, we will not reverse a judgment by default for mere technical defects in the complaint which fall short of an entire want of something which is material to the plaintiff's right to recover. So the cases referred to declare, and in this respect they are sound. The error in those cases was in giving countenance to the implication that the court would do so in any case by not declaring the rule to be universal. On the question of reversal, this court can make no distinction between judgments by default and judgments upon issue joined and tried, for the statute makes none. It will reverse the former where it would the latter."<sup>1</sup> "In determining the sufficiency of a pleading to support a judgment by default, the averments of the

<sup>1</sup> *Hallock v. Jaudin*, 34 Cal. 167.

pleading are to be taken as proved or confessed; and if the pleading does not inform the court what judgment to render,—that is, if it does not with sufficient certainty set forth the cause of action as to names of parties, dates, amounts, etc., to enable the court to render judgment without information *aliunde*,—it is not sufficient, and the judgment cannot be sustained.”<sup>1</sup> By not answering the complaint within the time allowed after the service of process, the defendant, in contemplation of law, admits its statements to be true; and if these statements disclose a cause of action against him, and judgment is nevertheless entered in his favor, the plaintiff may procure its reversal upon appeal.<sup>2</sup> On the other hand, the defendant, in thus admitting the statements of the complaint, does not concede that the plaintiff is entitled to the relief prayed for therein, or any relief whatsoever. What relief shall be granted after the default is a question of law for the determination of the trial court; but its determination must be sustained by the allegations of the complaint, and when not so sustained, may be set aside or corrected upon appeal.<sup>3</sup>

§ 539. **On Good and Bad Counts.**—A difference of opinion exists in regard to judgments upon default based upon complaints containing several counts, some of which are good and others defective. In California it held that the default “confesses all the issuable facts of the several causes of action counted upon,” and that “the fact that by reason of one of them having been imperfectly stated, no judgment could be rendered on that count, does not affect the right of plaintiff to take judgment on those which are rightly stated,” and therefore that the judgment by default will not be reversed.<sup>4</sup> But in Massa-

<sup>1</sup> *Kimmarle v. Houston T. C. R'y Co.*, 76 Tex. 686. 76 Cal. 299; *Madison Co. v. Smith*, 95 Ill. 328; *Bagley v. Pridgeon*, 42 Mich. 550.

<sup>2</sup> *Swain v. Burnette*, 76 Cal. 299.

<sup>3</sup> *Choynski v. Cohen*, 39 Cal. 502;

2 Am. Rep. 476; *Rhoda v. Alameda Co.*, 52 Cal. 350; *Swain v. Burnette*,

<sup>4</sup> *Hunt v. City of San Francisco*, 11 Cal. 250.

chusetts an opposite conclusion is sustained. The court, considering this question in that state, said: "The damages after a default are general, and without looking into the papers filed to see how the damages were in fact assessed, there is no legal ground to presume that they were not assessed on this count. The rule is well settled, in case of a verdict and general damages, when one count is bad in substance, that the judgment must be reversed, except where it can be amended by the certificate of the judge so as to show that the damages were assessed on the good counts alone. The same reasons apply with even more force in case of general damages on a default."<sup>1</sup>

§ 540. **Errors Reviewable on Appeal.** — "There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury; and in the former as well as in the latter case, the error may be corrected on appeal."<sup>2</sup> This error may consist in rendering judgment where there is an entire want of jurisdiction over the defendant, or where there is no sufficient statement of a cause of action against him. In both of these cases, as we have seen, the appellate court will exercise its supervisory powers. But its authority is not confined to the correction of these extreme and radical errors. It will interpose to correct errors and irregularities in the proceedings, and though the proceedings are regular, will correct errors of the court or of its clerk entering into the judgment to the prejudice of the appellant. It will reverse a judgment by default entered before the expiration of the time allowed for the defendant to answer,<sup>3</sup> or founded upon a summons radically defective,<sup>4</sup> and will so modify any judgment by default as to free it from error, and to make it such a judgment as, in the opinion of the appellate

<sup>1</sup> *Dryden v. Dryden*, 9 Pick. 546; *Hanson v. Nicklin*, 34 Ohio St. 123; *Hemmenway v. Hickes*, 4 Pick. 496. *Burns v. Loeb*, 59 Miss. 167.

<sup>2</sup> *Stevens v. Ross*, 1 Cal. 94.

<sup>4</sup> *Porter v. Hermann*, 8 Cal. 619.

<sup>3</sup> *Burt v. Scranton*, 1 Cal. 416; *Wil-*

court, ought to have been rendered upon the facts confessed by the default.<sup>1</sup> Generally, with respect to questions of jurisdiction, the rule upon appeal is, that the record must show the existence of all the facts required to authorize the court to act at the time and under the circumstances in which it acted, and though a jurisdictional defect is not such as to render a judgment void, it may expose it to reversal upon appeal.<sup>2</sup>

§ 541. **Opening.**—The courts possess and exercise a very large discretion in vacating judgments by default, for the purpose of permitting a defense to be made on the merits. No rule can be laid down on this subject which would be applicable in all the different states. In Missouri, the rule is, "that a meritorious defense and a reasonable degree of diligence in making it are all that it is necessary to establish, in order to justify the setting aside of a default."<sup>3</sup> In deciding upon the question of diligence, the action of the court will be reviewed only in extreme cases, involving an abuse of the discretion vested in court.<sup>4</sup>

§ 542. **Imposition of Terms.**—It is a rule, almost universally acknowledged and applied, that a default will not be opened without imposing such terms as forbid that any advantage be taken of mere technical errors. A defendant in default has no right to a hearing except upon matters "which touch the honesty and justice of the case."<sup>5</sup> But the rule has been denied, or at least mate-

<sup>1</sup> *Gage v. Rogers*, 20 Cal. 91; *Rann v. Reynolds*, 11 Cal. 14; *Lamping & Co. v. Hyatt*, 27 Cal. 99; *Lattimer v. Ryan*, 20 Cal. 633; *Wallace v. Eldredge*, 27 Cal. 495; *Harding v. Cowing*, 28 Cal. 212.

<sup>2</sup> *Houk v. Barthold*, 73 Ind. 21; *Barney v. Vigoureux*, 75 Cal. 376; *Young v. Dickey*, 63 Ind. 31.

<sup>3</sup> *Adams v. Hickman*, 43 Mo. 163.

<sup>4</sup> *Woodward v. Backus*, 20 Cal. 137; *Bailey v. Taaffe*, 29 Cal. 422; *Wooster v. Woodhull*, 1 Johns. Ch. 539; *Frazier v. Bishop*, 29 Mo. 447; *Ewing v.*

*Peck*, 17 Ala. 339; *Palmer v. Hutchins*, 1 Cow. 42. See *ante*, chapters VI, VII; and *National C. M. Co. v. Brandenburg*, 40 N. J. L. 110; *Yates v. Guthrie*, 119 N. Y. 420; *Mickley v. Tomlinson*, 79 Iowa, 333; *Whereatt v. Ellis*, 70 Wis. 207; 5 Am. St. Rep. 164; *Midkiff v. Lusher*, 27 W. Va. 439; *Beatty v. O'Connor*, 106 Ind. 81.

<sup>5</sup> *Bailey v. Clayton*, 20 Pa. St. 236; *King v. Merchants' Exchange Co.*, 2 Sand. 697; *Gay v. Gay*, 10 Paige, 374; *Bard v. Fort*, 3 Barb. Ch. 632. See *ante*, *seca.* 108, 102.

rially modified, in New York. Thus in that state a default will be opened without imposing the condition that the defendant shall not plead the statute of limitations, unless it be shown that such plea will be more difficult to controvert than before the default was taken.<sup>1</sup> In a case where the court opened a default to allow the defendant to plead that the note sued upon was given for a gambling debt, the following forcible and apparently unanswerable reasons were given for its decision: "There should be no selection or choice by the courts as to what law should be enforced, or what should be evaded or nullified; what should be favored; what treated with disfavor. The principle and policy of this favor and disfavor are wrong. If it is hard to allow such a defense, the law is to blame in providing the defense. The courts should not undertake to say that certain defenses provided by law are hard and unconscionable, and therefore undertake to legislate against them."<sup>2</sup> If, however, the defendant was not in default, and the entry of judgment against him was due to a mistake respecting the time when his right to answer expired, the court has no right to impose conditions, but must unconditionally vacate the unauthorized entry of judgment against him.<sup>3</sup>

<sup>1</sup> *Douglas v. Douglas*, 3 Edw. Ch. 390; *Gourlay v. Hutton*, 10 Wend. 595.      lation to opening and vacating judgments by default, see chapters VI, VII., on vacating judgments.

<sup>2</sup> *Bank of Kinderhook v. Gifford*, 40 Barb. 659. For various matters in re-      <sup>3</sup> *Yates v. Guthrie*, 119 N. Y. 420.

## CHAPTER XXV.

### JUDGMENTS ON CONFESSION WITHOUT ACTION.

- § 543. Construction of statutes regarding.
- § 544. What judgments are within the statutes.
- § 545. Who may make or accept a confession of judgment.
- § 546. What may be confessed for.
- § 547. Jurisdiction of the court.
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- § 549. General requisites of statement.
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- § 552. Sufficient statements.
- § 553. Statement on promissory note.
- § 554. Statement for goods sold.
- § 555. Statement for money lent.
- § 556. Statement for balance due.
- § 557. When void, and when voidable only.
- § 558. Defendant's right to relief from.
- § 558 a. The effect of judgments by confession.

§ 543. **Construction of Statutes Regarding.**—In many, and perhaps in all, of the states statutes have been enacted which authorize the entry of judgments by confession without action, under the circumstances and in the manner therein set forth. If a judgment by confession has been entered or attempted to be entered, there may be a difference of opinion as to the time and mode in which and the person by whom its regularity and effect may be called in question; but when an attack is made upon it in the manner and at the time sanctioned by the practice in the state, and by a person entitled to be heard, there is no doubt that the judgment can be sustained only by proving a substantial compliance with the statute in every respect. In fact, the general language of the decisions upon this subject is, that these statutes are strictly construed, and therefore must be strictly pursued.<sup>1</sup>

<sup>1</sup> *Hawes v. Pritchard*, 71 Ind. 166; *Iowa*, 136; *Rosebrough v. Analey*, 35 Chapin v. Thompson, 20 Cal. 686; *Ohio St.* 107; *Henry v. Estes*, 127 M. & M. Bank of Philadelphia v. St. Mass. 474; *Grubbs v. Blum*, 62 Tex. John, 5 Hill, 497; *Edgar v. Greer*, 7 426; *Barker v. Beeber*, 112 Pa. St. 216.

When, on the other hand, the statute is complied with, nothing further can be exacted;<sup>1</sup> and hence a judgment cannot be disregarded because of the failure to file a complaint or serve a citation, or to do any other act not required to be done by the statute. In some of the states the judgment is not final when confessed, but must afterwards be presented to the court for confirmation;<sup>2</sup> and while we have met with no adjudications upon the subject, we presume that when the confirmation of the court is procured, it may be regarded, unless set aside, as curing all irregularities not going to the jurisdiction of the court.

§ 544. **What Judgments are within the Statutes.**—The question has frequently arisen whether a judgment under consideration was authorized and controlled by the provisions of the statute concerning the entry of judgments by confession without action, or was sanctioned and sustained by some other law. It is certain that the statute does not apply to any judgment confessed in an action regularly commenced, and in which process is regularly issued and served.<sup>3</sup> It has been held to be essential that the process should be *served*, and that, though action be regularly instituted, the voluntary appearance of the defendant and his admissions of the facts stated in the complaint will not sustain the judgment, in the absence of the *statement* prescribed by statute.<sup>4</sup> But the service here spoken of is not necessarily a service in the usual manner. The acceptance of service by the defendant is equivalent to service in the ordinary form, and takes the case out of the operation of the statute requiring an affidavit as to the justness of the debt.<sup>5</sup>

<sup>1</sup> Johnston v. Glasgow, 5 Ark. 311; Choat v. Bennett, 11 Ark. 313; Marbury v. Pace, 29 La. Ann. 557.

<sup>2</sup> Bass v. Kstill, 50 Miss. 300.

<sup>3</sup> Hoguet v. Wallace, 28 N. J. L. 524; Miller v. Bank of British Colum-

bia, 2 Or. 291; Crouse v. Derbyshire, 10 Mich. 479; 82 Am. Dec. 51; Schroeder v. Fromme, 31 Tex. 602; Chestnut v. Pollard, 77 Tex. 86.

<sup>4</sup> Flanigan v. Bruner, 10 Tex. 257.

<sup>5</sup> Gerald v. Burthee, 29 Tex. 203.



§ 545. **Who may Make or Accept a Confession of Judgment.**—Doubtless, as a general rule, all persons for or against whom a valid judgment may be entered in a contested litigation are equally competent to accept or give a judgment by confession, except that where a party making a confession without action is under some disability, he is more clearly entitled to relief or to have the judgment treated as void than if it were pronounced by a court after obtaining jurisdiction in the ordinary mode, and formally hearing and considering the law and the facts. A confession may be in favor of any person, or of any corporation, public or private, having capacity to sue.<sup>1</sup> It may be against any person not subject to any disability; and the clerk of a court, because he in entering a judgment acts in a ministerial capacity, may enter a judgment by confession against himself.<sup>2</sup> A person, however nearly related to another by consanguinity or affinity, may confess judgment in his favor, and when confessed it is not subject to attack upon any other ground than if the parties were strangers, except that the near relationship may be taken into consideration in connection with evidence tending to prove that the judgment was without consideration, or otherwise fraudulent as against creditors.<sup>3</sup> A valid judgment by confession may be entered against a married woman under a warrant of attorney made by her while a *feme sole*. In other words, such warrant, being operative when made, is not revoked by her subsequent marriage.<sup>4</sup> With respect to judgments by confession against a married woman, not based upon a warrant of attorney given before her marriage, the authorities are by no means harmonious; some of them declare such a judgment void,<sup>5</sup> unless when given as part

<sup>1</sup> *State v. Love*, 1 Ired. 264; *Sheble v. Cummins*, 1 Browne (Pa.) 253.

<sup>2</sup> *Smith v. Mayo*, 83 Va. 910; *Moore v. Trimmer*, 32 S. O. 511.

<sup>3</sup> *Brown's Appeal*, 86 Pa. St. 524; *Collins v. Cronin*, 117 Pa. St. 35.

<sup>4</sup> *Baker v. Lukens*, 35 Pa. St. 146;

*Eneu v. Clark*, 2 Pa. St. 234; 44 Am. Dec. 191.

<sup>5</sup> *Keiper v. Helfricke*, 42 Pa. St. 325; *Keen v. Coleman*, 39 Pa. St. 299; 80 Am. Dec. 524; *Brunner's Appeal*, 47 Pa. St. 67; *Shallcross v. Smith*, 81 Pa. St. 132.

of the purchase price of property bought by her and held as her separate estate, and even then confine its effect to the property so purchased.<sup>1</sup> Upon principle, the validity and effect of a judgment confessed by a married woman must depend upon her competency under the laws of the state to make contracts and to be sued thereon. If she is not competent to make the contract or to create the obligation upon which she confesses judgment, then such judgment should be treated as of no greater effect than the obligation confessed; and on the other hand, if the obligation confessed is valid, and capable of enforcement by action against her, in which judgment may be recovered whether she resists or not, then she ought to be deemed competent to confess judgment thereupon.<sup>2</sup> When a judgment by confession is entered against a husband and wife, which is invalid as against her, it is sometimes treated as an entirety, and therefore void as against both;<sup>3</sup> but the better opinion is, that it is operative against the husband.<sup>4</sup> Where the common-law rule prevails that the husband and wife must be regarded as one person, and therefore as incompetent to contract with or to sue each other, a judgment cannot be confessed by a husband in favor of his wife;<sup>5</sup> but where they make contracts with each other, and she may enforce her contracts by action against him, he may confess judgment in her favor.<sup>6</sup> A minor is not competent to give a warrant of attorney authorizing the entry of judgment against him, and a judgment based upon such warrant will be set aside on his motion.<sup>7</sup>

<sup>1</sup> *Christner v. Hochstetler*, 109 Pa. St. 27; *Quinn's Appeal*, 86 Pa. St. 447.

<sup>2</sup> *Travis v. Willis*, 55 Miss. 557; *Heywood v. Shreve*, 44 N. J. L. 94; *Baines v. Burbridge*, 15 La. Ann. 628; *Dancy v. Martin*, 23 La. Ann. 323; *Henchman v. Roberts*, 2 Harr. (Del.) 74; *Mendenhall's Ex'rs v. Springer*, 3 Harr. (Del.) 87; *Patton v. Stewart*, 19 Ind. 233; *Wallace v. Rippon*, 2 Bay, 112; *Edwards v. Edwards*, 29 La. Ann.

597; *First Nat. Bank v. Garlinghouse*, 53 Barb. 615; *Orenshaw v. Julian*, 26 S. C. 283; 4 Am. St. Rep. 719.

<sup>3</sup> *Mendenhall's Ex'rs v. Springer*, 3 Harr. (Del.) 87.

<sup>4</sup> *Shallcross v. Smith*, 81 Pa. St. 132; *Wallace v. Rippon*, 2 Bay, 112.

<sup>5</sup> *Counts v. Markling*, 30 Ark. 17.

<sup>6</sup> *Thomas v. Mueller*, 106 Ill. 36; *Williams's Appeal*, 47 Pa. St. 307.

<sup>7</sup> *Knox v. Flack*, 22 Pa. St. 337; *Bennett v. Davis*, 6 Cow. 393.

Upon the general rule that whatever a person may do for himself he may also do by another, it is affirmed that a valid confession may be made by an agent if within his authority.<sup>1</sup> If the agent exceeds his authority by confessing for too great an amount, the judgment is void *only as to such excess*.<sup>2</sup> While the power to confess judgment by an agent or attorney is undoubted, it must be conferred in express terms, and cannot be implied from the relations of the parties. Hence if two or more are jointly liable upon any obligation, whether as partners or otherwise, the partnership or the joint obligation cannot authorize either to act for the others. Hence no partner<sup>3</sup> or other joint obligor<sup>4</sup> is bound by a judgment confessed by his copartners or co-obligors without his express authorization. In Oregon, judgment against a corporation may be confessed by any of its officers or agents on whom a summons against the corporation could be lawfully served.<sup>5</sup> But, independently of statute, we apprehend that no officer of a corporation has, unless specially authorized, power to confess a judgment against it,<sup>6</sup> though there is no doubt that a corporation may confess a judgment against itself, acting through and by its duly authorized officers or agents.<sup>7</sup> In New York it has been held that a public officer liable to be sued for services rendered for the public at his request may confess judgment for the amount due. The court said: "The statute is broad enough to include public officers, and I am of opinion that in every case where a person is liable to be prosecuted

<sup>1</sup> Parker v. Poole, 12 Tex. 86.

<sup>2</sup> Davenport v. Wright, 51 Pa. St. 292.

<sup>3</sup> McCleery v. Thompson, 130 Pa. St. 443; Bitzer v. Shunk, 1 Watts & S. 340; 37 Am. Dec. 469; Hopper v. Lucas, 86 Ind. 43; Crane v. French, 1 Wend. 311; Mills v. Dickson, 6 Rich. 487; Stoutenburg v. Vandenberg, 7 How. Pr. 229; Canal and Lead Mine Co. v. Walker, 11 L. C. Jur. 433; Christy v. Sherman, 10 Iowa, 535; Bank's Appeal, 36 Pa. St. 458; Richardson v. Fuller, 2 Or. 179; Elliott v.

Holbrook, 33 Ala. 659; Soper v. Fry, 37 Mich. 236. *Contra* opinion, see Bump v. Piercy, 4 N. Y. Leg. Obs. 423.

<sup>4</sup> Tripp v. Saunders, 59 How. 379; Wiggins v. Kleinhans, 9 N. J. L. 249; Ballinger v. Sherron, 14 N. J. L. 144; Conrey v. Rotchford, 30 La. Ann., pt. 1, p. 692.

<sup>5</sup> Miller v. Bank of British Columbia, 2 Or. 291.

<sup>6</sup> McMurray v. St. Louis, 33 Mo. 377.

<sup>7</sup> Sharp v. Danville etc. R'y Co., 106 N. C. 308; 19 Am. St. Rep. 533.

to judgment, he may lawfully confess a judgment for the amount justly due. I can conceive no sound reasons of public policy which require the public to be burdened with the costs of litigation in every case where a claimant proceeds to put his claim into judgment."<sup>1</sup> If trustees have the power to sell property under certain circumstances, they cannot by confessing judgment create a lien against the property, and thereby bring about a sale in a mode or under contingencies not sanctioned by the instrument creating the trust.<sup>2</sup>

In many of the states the practice prevails of taking powers or warrants of attorney authorizing some one to appear and confess judgment for a particular sum, or for the amount of some note or contract annexed to such power or referred to therein. The statute may require the instrument authorizing the confession to be distinct from that containing the bond, contract, or other evidence of indebtedness, in which case a warrant of attorney contained in a note or bond is invalid.<sup>3</sup> In the absence of a statute of this purport, a warrant of attorney may be made part of a note or other obligation, so that a single signature may manifest the obligor's assent both to the obligation and the warrant.<sup>4</sup> Unless the statutes of a state prescribe the form of a warrant of attorney, any warrant is sufficient, if from its whole contents and the writings referred to in it the purpose of the person giving it appears to be to authorize some other person to confess or to have entered the judgment in question.<sup>5</sup> Though there is an omission to fill a blank, or an error in describing the demand upon which judgment is to be confessed, a warrant will be sustained if it clearly appears therefrom what was intended to be inserted in the blank or what demand was

<sup>1</sup> Gere v. Supervisors of Cayuga, 7 How. Pr. 257.

<sup>2</sup> Mallory v. Clark, 20 How. Pr. 418; Marks v. Reynolds, 12 Abb. Pr. 403; Hunt v. Townshend, 31 Md. 336; 100 Am. Dec. 63.

<sup>3</sup> Richards v. Bank, 12 Wis. 693; Vliet v. Camp, 13 Wis. 198.

<sup>4</sup> Sloane v. Anderson, 57 Wis. 123.

<sup>5</sup> Mason v. Smith, 8 Ind. 73; Gambia v. Howe, 8 Blackf. 133.

intended to be described.<sup>1</sup> If, on the other hand, it is uncertain what was intended to be inserted in the blank or what demand was misdescribed, the warrant is insufficient.<sup>2</sup> The warrant need not name the person who is to confess the judgment. It must, however, describe him so as to show either that some particular person, or any one of some class of persons, may act.<sup>3</sup> The authority may be given to any one of a designated class without naming him, and hence a warrant may empower any attorney of a particular court, or any attorney of any court of record within the state, to confess a judgment.<sup>4</sup> Under a warrant authorizing confession of judgment "at any time hereafter," judgment may be confessed thereafter on the same day,<sup>5</sup> and in vacation as well as in term time,<sup>6</sup> and before as well as after the demand becomes due.<sup>7</sup> The warrant need not be under seal.<sup>8</sup> If the judgment confessed thereon is for any cause reversed or set aside, the power contained in the warrant cannot be regarded as exhausted, and judgment may thereafter be confessed thereunder as though no previous entry of judgment had been attempted.<sup>9</sup> While a warrant of attorney may doubtless be so drawn as to authorize a confession to be made in another state, yet the intention to give authority to act beyond the state is not presumed, and though some of the words used are sufficiently comprehensive to justify the attorney in acting in the state or country, yet if there are other words which appear to limit the authority to the state in which the warrant was executed, they will prevail.<sup>10</sup> So if the laws of a state do not permit the entry of a judgment by confession upon a warrant of attorney,

<sup>1</sup> *Sweesey v. Kitchen*, 80 Pa. St. 160; *Osgood v. Blackmore*, 59 Ill. 261.

<sup>2</sup> *Morris v. Commerce Bank*, 67 Tex. 602; *Chase v. Dana*, 44 Ill. 262.

<sup>3</sup> *Rabe v. Heslip*, 4 Pa. St. 139.

<sup>4</sup> *Patton v. Stewart*, 19 Ind. 233.

<sup>5</sup> *Thomas v. Mueller*, 106 Ill. 36;

*Cummins v. Holmes*, 11 Ill. App. 158.

<sup>6</sup> *Keith v. Kellogg*, 97 Ill. 147; *Kellogg v. Keith*, 4 Ill. App. 386.

<sup>7</sup> *Towle v. Genter*, 5 Ill. App. 17, 25; *Alldritt v. Morrison Bank*, 22 Ill. App. 24, 192; *McDonald v. Chisholm*, 131 Ill. 273.

<sup>8</sup> *Kneedler's Appeal*, 92 Pa. St. 428.

<sup>9</sup> *Huner v. Doolittle*, 3 G. Greene, 76; 54 Am. Dec. 439.

<sup>10</sup> *Manufacturers' and M. Bank v. Boyd*, 3 Denio, 257; *Manufacturers' and M. Bank v. St. John*, 5 Hill, 497.

it is inoperative there though executed in a state in which it was valid.<sup>1</sup> Where a judgment is confessed before a clerk by one acting under a warrant of attorney, the evidence of his authority must generally not only be produced, but must be filed or otherwise made a part of the record, and in the absence of the evidence of such authority, the judgment cannot be sustained; but if the confession is before the court, it will be presumed to have taken evidence and satisfied itself of the authority of the person acting for the defendant, and the absence from the record of the evidence on which the court acted does not avoid the judgment.<sup>2</sup> A warrant or other authority to confess judgment in favor of a third person is revocable at the pleasure of the principal, unless it is supported by a consideration, or held as security, or necessary to effectuate a security;<sup>3</sup> but if a power of attorney is given as part of a security to a creditor, it is irrevocable, and this rule applies to powers and warrants of attorney given to a creditor or to his attorney authorizing the confession of judgment against the debtor.<sup>4</sup>

§ 546. **What may be Confessed for.**—The statute provides that the confession may be for money due or to become due. This, it has been held, does not authorize the entry of judgment without action upon a demand for damages arising out of a tort.<sup>5</sup> Judgment by confession must be for a sum certain. Where a party confessed judgment for such sum as should be awarded, before the award was made, the action of the justice in subsequently entering judgment in accordance with the confession was reversed.<sup>6</sup> When a judgment by confession is entered by a clerk of a court acting without any directions from the

<sup>1</sup> *Hamilton v. Schoenberger*, 47 Iowa, 335.

<sup>2</sup> *Iglehart v. Chicago Ins. Co.*, 35 Ill. 514; *Anderson v. Field*, 6 Ill. App. 307; *Gambia v. Howe*, 8 Blackf. 133; *Hinds v. Hopkins*, 28 Ill. 344; *Iglehart v. Church*, 35 Ill. 255; *Chambers v. Denie*, 2 Pa. St. 421.

<sup>3</sup> *Evans v. Fearn*, 16 Ala. 639; 50 Am. Dec. 197.

<sup>4</sup> *Wassell v. Reardon*, 11 Ark. 705; 54 Am. Dec. 245.

<sup>5</sup> *Boutel v. Owens*, 2 Sand. 655; 2 Code R. 40; *Burkham v. Van Saun*, 14 Abb. Pr., N. S., 163.

<sup>6</sup> *Nichols v. Hewit*, 4 Johns. 423.

judge, the amount for which it is to be entered must appear on the face of the confession or be ascertainable therefrom by computation. The clerk cannot act contrary to the terms of the confession, nor supply omissions therein, nor exercise judicial functions.<sup>1</sup> In some of the states a judgment by confession is unauthorized unless the debt is one actually and unconditionally existing at the time, and therefore cannot be sustained when based upon an indorsement or other contingent liability.<sup>2</sup> Most of the statutes respecting judgments by confession permit them to be made for moneys to become due as well as for moneys due;<sup>3</sup> and a warrant of attorney may therefore authorize judgment to be confessed before the demand becomes due.<sup>4</sup> If, however, it directs such confession to be in certain contingencies only, the record must show that the contingency has happened.<sup>5</sup> Where a party has made advancements to another, or has made indorsements, or has otherwise become contingently liable for him, a judgment by confession may be entered to cover advances to be made or to secure indemnity for contingent liability;<sup>6</sup> but if after judgment has been entered another judgment is recovered against the defendant, it is doubtful whether the plaintiff may safely make further advances without incurring the risk of having the lien of the judgment so recovered treated as paramount to his lien for advances made after its recovery.<sup>7</sup> Though a debtor cannot be compelled to pay a debt, it may sometimes constitute a sufficient consideration for a new prom-

<sup>1</sup> *Bonta v. Clay*, 1 Litt. 27; *Hope v. Everhart*, 70 Pa. St. 231; *Connay v. Halstead*, 73 Pa. St. 354; *Tucker v. Gill*, 61 Ill. 236.

<sup>2</sup> *Sayre v. Huse*, 32 N. J. Eq. 652; *Clapp v. Ely*, 10 N. J. Eq. 178; *Clapp v. Ely*, 27 N. J. L. 555; *Hulse v. Mer-shon*, 125 Ill. 52; *Warwick v. Petty*, 44 N. J. L. 542.

<sup>3</sup> *Black v. Pattison*, 61 Miss. 599; *Mechanics' Bank v. Mayer*, 93 Mo. 417; *McClish v. Manning*, 3 Iowa, 223; *Calloway v. Bryam*, 95 Ind. 423.

<sup>4</sup> *Reid v. Southworth*, 71 Wis. 238;

*Smith v. Pringle*, 100 Pa. St. 275; *McDonald v. Chisholm*, 131 Ill. 273; *All-dritt v. Morrison Nat. Bank*, 22 Ill. App. 24.

<sup>5</sup> *Roundy v. Hunt*, 24 Ill. 598.

<sup>6</sup> *Lansing v. Woodworth*, 1 Sand. Ch. 43; *Cook v. Whipple*, 55 N. Y. 150; 14 Am. Rep. 202; *Brinkerhoff v. Mar-vin*, 5 Johns. Ch. 320; *Dow v. Platner*, 16 N. Y. 562; *Truscott v. King*, 6 N. Y. 147.

<sup>7</sup> *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320.

ise, as where it has been discharged by proceedings in bankruptcy, or its compulsory collection rendered impossible by the interposition of the statute of limitations. In these cases he may confess judgment for the debt so discharged or barred, and the judgment cannot on that account be deemed fraudulent as against his creditors.<sup>1</sup> As between debtor and creditor, the former, in the event of his not paying the debt when due, may agree to pay the fees of the attorney employed in its collection, and may therefore, in a warrant of attorney, authorize judgment to be confessed for the fees of the attorney as well as for the amount of the debt;<sup>2</sup> but it is said that when a debtor is insolvent he has no right to select a portion of his creditors, and, in effect, pay the expenses of collecting their demands, when he is under no legal obligation to do so; and that if he does this by executing warrants of attorney under which judgments may be entered for attorneys' fees, such judgments are invalid as against his other creditors.<sup>3</sup>

§ 547. **Jurisdiction of the Court.**—Judgments by confession are in no wise exempt from the rule applicable to other judgments, that to be valid they must be entered in a court having jurisdiction over the subject-matter of the action and the parties thereto.<sup>4</sup> "Though no adjudication is in fact required in entering a judgment of confession without action, yet it has all the qualities, incidents, and attributes of other judgments, and cannot be valid unless entered in a court which might have lawfully pronounced the same judgment in a contested action."<sup>5</sup> Where the law requires judgments to be signed by the judge, its provision extends to judgment by confession, and renders them void if not so signed.<sup>6</sup>

<sup>1</sup> *Dewey v. Moyer*, 72 N. Y. 70; *Keen v. Kleckner*, 42 Pa. St. 529.

<sup>2</sup> *Ball v. Miller*, 38 Ill. 110; *Weigley v. Matson*, 125 Ill. 64; 8 Am. St. Rep. 335; *Campbell v. Goddard*, 123 Ill. 220.

<sup>3</sup> *Hulse v. Mershon*, 125 Ill. 52.

<sup>4</sup> *Rapley v. Price*, 9 Ark. 423; *Tenny v. Filer*, 8 Wend. 569; *Camp v. Woods*, 10 Watts, 118; *Spear v. Carter*, 1 Mich. 19; 48 Am. Dec. 688.

<sup>5</sup> *Lanning v. Carpenter*, 23 Barb. 402.

<sup>6</sup> *Chapin v. Thompson*, 20 Cal. 681.



§ 548. **Consent of Plaintiff.**—A judgment by confession, entered without the knowledge or consent of the creditor in whose favor it is, is, prior to the ratification by him, invalid for all purposes, being neither operative as a lien, an estoppel, nor as a merger of the demand. But if the creditor afterward accepts and ratifies it, it becomes, from the moment of its acceptance, valid, and attended with all the results incident to other valid judgments.<sup>1</sup> The personal knowledge of the creditor is not, however, essential in any case. It is sufficient that the judgment was confessed with the knowledge and assent of any attorney at law or in fact authorized to act for the creditor and to accept such confession on his behalf.<sup>2</sup>

§ 549. **General Requisites of Statement.**—The statute provides for a statement in writing, signed by the defendant and verified by his oath, showing the amount for which judgment may be entered, and authorizing its entry; stating concisely the facts out of which the indebtedness due or to become due arose; or in case the confession is intended to secure a contingent liability, stating concisely the facts constituting the liability, and showing that the sum confessed does not exceed such liability. The object of the statement is to so inform persons with whose interest the judgment conflicts as to enable them to ascertain the truth or falsity of the claims on which it is based. The statement "should be specific in sums, dates, and considerations, to enable other creditors, with reasonable facility, to investigate its genuineness and protect themselves from fraud."<sup>3</sup> But "it need not state enough of the transaction to enable creditors to judge *without inquiry* whether the matter is fair or not."<sup>4</sup> A statement need not be more definite than a complaint on

<sup>1</sup> Wilcoxson v. Burton, 27 Cal. 228; 87 Am. Dec. 66; McCalmont v. Peters, 13 Serg. & R. 196; Flanigan v. Continental I. Co., 22 Neb. 235; Farmers' etc. Bank v. Mather, 30 Iowa, 283; Chapin v. McLaren, 105 Ind. 563.

<sup>2</sup> Chapin v. McLaren, 105 Ind. 563.

<sup>3</sup> Moody v. Townsend, 2 Abb. Pr. 375.

<sup>4</sup> McDowell v. Daniels, 38 Barb. 143.

the same cause of action.<sup>1</sup> While the right to amend a defective statement may be granted by the court, in the exercise of its discretion, it will rarely, and perhaps never, be allowed to prejudice other creditors who have obtained judgment and other liens against the defendant entitled to precedence over the judgment by confession, and the lien and proceedings based thereon, in the absence of such amendment.<sup>2</sup>

§ 550. **Verification of Statement.**—That the defendant “believes the above statement of confession is true,” has been held to be a sufficient verification, on the ground that he could be convicted of perjury if the statement were untrue.<sup>3</sup> But subsequently, in the same state and by the court of last resort, a similar verification was decided to be insufficient, and the rule was established, that, as to matters within the knowledge of the defendant, he must make a *direct* statement, and as to other matters he must state his information, and add that he believes it to be true.<sup>4</sup> “That the facts stated in the above confession are true,” is a good verification.<sup>5</sup> If the verification be defective, it may be amended even when the judgment is offered in evidence in another case.<sup>6</sup>

§ 551. **Signing Statement.**—If the verification and statement are on the same page, and the signature of the defendant is to the former only, this is a substantial compliance with the requirement of the statute, that the state-

<sup>1</sup> Cordier v. Schloss, 12 Cal. 143. With respect to the sufficiency of affidavits and statements upon which judgments by confession are based, see Weinges v. Cash, 15 S. C. 44; Hawes v. Pritchard, 71 Ind. 166; Hardenbrook v. Sherwood, 72 Ind. 403; Sloane v. Anderson, 57 Wis. 123; Kendig v. Marble, 58 Iowa, 529; Davensport v. Leary, 85 N. C. 203; Wells v. Gieseke, 27 Minn. 478; Grattan v. Matteson, 54 Iowa, 229; Mulford v. Stratton, 41 N. J. L. 466; Harrison v. Gibbons, 71 N. Y. 58.

<sup>2</sup> Bryan v. Miller, 28 Mo. 32; 75 Am. Dec. 107; Wells v. Gieseke, 27 Minn. 478; Symson v. Selheimer, 105 N. Y. 666.

<sup>3</sup> Delaware v. Ensign, 21 Barb. 85.

<sup>4</sup> Ingram v. Robbins, 33 N. Y. 409; 88 Am. Dec. 393; Cook v. Whipple, 55 N. Y. 150; 14 Am. Rep. 202.

<sup>5</sup> Mosher v. Heydrick, 30 How. Pr. 161; 45 Barb. 549.

<sup>6</sup> Cook v. Whipple, 55 N. Y. 150; 14 Am. Rep. 202.

ment "must be made and signed by the defendant";<sup>1</sup> but a signing by the defendant's attorneys is not permissible, and a judgment founded thereon is void.<sup>2</sup>

§ 552. **Sufficient Statements.**—The statement need not aver in the terms of the statute that the amount "is justly due or to become due." What the statute requires is, that the facts set forth shall make it apparent that a debt is "justly due or to become due." That being done, an additional averment in the language of the statute is surplusage. Though a just debt, once existing, may have been released or discharged, still the defendant is not required to negative all the conceivable possibilities of the case, and therefore the statement need not assert that the debt has not been paid nor otherwise discharged.<sup>3</sup>

§ 553. **On Promissory Notes.**—If the statement is upon a promissory note, it is sufficient to set forth its amount and date, with the consideration for which it was made and the time when it was made payable.<sup>4</sup> The words "that amount being had of the plaintiff by the defendant" have been considered a sufficient statement of the consideration of a note;<sup>5</sup> and so have the words "being for money paid by plaintiff for me on the real estate I now own at Irving."<sup>6</sup> A statement showing the date and amount of a note and the time when due, and averring that a specified sum is justly due for principal and interest to date, is insufficient.<sup>7</sup> The following statements on notes have been held insufficient: "That we, A. H., E. H., and J. H., are indebted to A. B. upon a note, of

<sup>1</sup> Purdy v. Upton, 10 How. Pr. 494; Post v. Coleman, 9 How. Pr. 64; Mosher v. Heydrick, 30 How. Pr. 161; 45 Barb. 549.

<sup>2</sup> Reynolds v. Lincoln, 71 Cal. 183; French v. Edwards, 5 Saw. 266.

<sup>3</sup> Lanning v. Carpenter, 20 N. Y. 447.

<sup>4</sup> Clements v. Gerow, 1 Keyes, 297; Kellogg v. Cowing, 33 N. Y. 408; Lanning v. Carpenter, 20 N. Y. 447;

affirming 23 Barb. 402; Kirby v. Fitzgerald, 31 N. Y. 417.

<sup>5</sup> Freligh v. Brink, 22 N. Y. 418.

<sup>6</sup> Acker v. Acker, 1 Keyes, 291.

<sup>7</sup> Chappel v. Chappel, 12 N. Y. 216; 64 Am. Dec. 496; Bank of Kinderhook v. Jenison, 15 How. Pr. 41; Winnebrenner v. Edgerton, 30 Barb. 185; Pond v. Davenport, 44 Cal. 481; Edgar v. Greer, 7 Iowa, 138.

which the following is a copy" (setting out copy);<sup>1</sup> that the debt is justly due to plaintiffs on a note made on a specified date by defendant to plaintiffs on a settlement made at a certain time for a given sum, and due one day from date;<sup>2</sup> that the note was made (giving date, amount, and time of payment) "for money had and received by me of said plaintiff at my request";<sup>3</sup> that the note was given for "liabilities incurred by the plaintiff for me by his indorsement of my notes, which the said plaintiff is to pay or has paid";<sup>4</sup> that "said note was given in good faith for a debt justly due plaintiff, and is unpaid, and this confession of judgment is given without fraud."<sup>5</sup> The fact that the confession is founded on a promissory note does not relieve the defendant from the necessity of stating the consideration upon which it was based with the same degree of certainty as if the confession was upon the original indebtedness. Hence it is not sufficient to merely set out the note,<sup>6</sup> adding that it was given in consideration of goods, wares, and merchandise sold by plaintiff to the defendant prior to the date of the note.<sup>7</sup> Where a confession is upon bills of exchange, which the statement particularly describes, it is sufficient if it further states that the defendant, being in need of money at a date named, drew the bills, and thereupon negotiated them to the plaintiff for a sum named, "less a discount at the rate of eight per cent per annum."<sup>8</sup> When a statement is upon a bond, its consideration is not sufficiently set forth by showing that it was given for a promissory note made by defendant to A, and indorsed by A to plaintiff. The mere making and indorsing of a note is no sufficient con-

<sup>1</sup> *Bonnell v. Henry*, 13 How. Pr. 142; *Norris v. Denton*, 30 Barb. 117; *Kendall v. Hodgins*, 1 Bosw. 659; *Murray v. Judson*, 9 N. Y. 73; 59 Am. Dec. 516.

<sup>2</sup> *Dunham v. Waterman*, 17 N. Y. 9; 72 Am. Dec. 406.

<sup>3</sup> *Daly v. Matthews*, 20 How. Pr. 267.

<sup>4</sup> *Von Beck v. Shuman*, 13 How. Pr. 472.

<sup>5</sup> *Kennedy v. Lowe*, 9 Iowa, 580.

<sup>6</sup> *Davidson v. Alexander*, 84 N. C. 621; *McHenry v. Shepard*, 2 Mo. App. 378.

<sup>7</sup> *Bryan v. Miller*, 23 Mo. 32; 75 Am. Dec. 107.

<sup>8</sup> *Mechanics' Bank v. Mayer*, 93 Me. 417.

sideration for a bond, unless such making or indorsing was upon some consideration.<sup>1</sup> The consideration for the making of a note is insufficiently described by stating that the note was "given for goods sold and delivered and money had and received. Indeed, the failure to state the amount due severally for goods and for money itself would be fatal."<sup>2</sup>

§ 554. **Goods Sold.**—In New York, statements based on indebtedness for goods sold and delivered have frequently been sustained, though exceedingly vague and indefinite both as to the character and quantity of the goods and as to the date of their purchase. The authorities in that state show that it is sufficient to state that the indebtedness "has arisen for goods, wares, and merchandise sold and delivered," and that such sale and delivery were in a certain month, or since a certain day, or within the last two years, or in two certain years.<sup>3</sup> A statement that the "indebtedness *arose on the sale* and conveyance by the plaintiff to the defendant of his right, title, and interest in the boats, property, and effects of William Mastin & Co., in January, 1854," was regarded as insufficient by Chief Justice Denio. But "on consultation, however, it appeared that all the other judges had come to the conclusion that it was valid because it was thought to affirm with reasonable certainty that the amount for which the judgment was confessed was the agreed price to be paid by the defendant for the interest of the plaintiff in the property of William Mastin & Co. upon the purchase by defendant of that interest."<sup>4</sup> The vagueness sanctioned by these decisions is not encouraged by adjudications made in other states. In Wisconsin a statement showed that the defendants purchased of plaintiffs "a large quantity of goods, wares, and merchandise"

<sup>1</sup> Reading v. Reading, 24 N. J. L. 358.

<sup>2</sup> Cordier v. Schloss, 18 Cal. 576.

<sup>3</sup> Delaware v. Ensign, 21 Barb. 85;  
Gandall v. Finn, 1 Keyes, 217; Read  
v. French, 28 N. Y. 285; Daniels v.

Clafin, 15 Iowa, 152; Clements v.

Gerow, 1 Keyes, 297; Neusbaum v.

Kaim, 24 N. Y. 325.

<sup>4</sup> Thompson v. Van Vechten, 27 N. Y.  
568; reversing 5 Abb. Pr. 458.

of a specified value, and that a sum named remained unpaid. When this statement came before the supreme court it was regarded as insufficient. An early case in New York declaring that "if the consideration was for goods sold, the specification ought to state the kind, quantity, and price of the goods and the time of the sale, as in a bill of parcels,"<sup>1</sup> was approved as containing a correct statement of the law on the subject.<sup>2</sup> In Missouri it is said a statement ought to show when and what kind of property was sold, the aggregate price, and the payments, if any, so as afford a clew to the creditor, if he wished to investigate the matter; but that the statement need not be as precise as a bill of particulars.<sup>3</sup>

§ 555. **For Money Lent.**—It is sufficient to state that the defendant is indebted for a specified sum of money lent,<sup>4</sup> giving the date of the loaning.<sup>5</sup> According to several New York cases, a statement showing that money "was lent and advanced at divers times" after a specified date is not sufficiently particular.<sup>6</sup> But the position taken in these cases is probably overthrown by a decision of the highest court in the same state, in which it was said that the statement that the money "was lent by plaintiff to defendant at various times" after a certain date could be supported within the current of the decisions.<sup>7</sup>

§ 556. **For Balance Due.**—A statement that "this confession of judgment is for and upon a balance of account against me for goods, wares, and merchandise purchased by me" of plaintiffs is defective. It does not state when the goods were bought, the terms, amount, quality, or kind; neither does it show what payments have been

<sup>1</sup> *Lawless v. Hackett*, 16 Johns. 149.

<sup>2</sup> *Nichols v. Kribs*, 10 Wis. 76; 76 Am. Dec. 294.

<sup>3</sup> *Bryan v. Miller*, 28 Mo. 32; 75 Am. Dec. 107.

<sup>4</sup> *Miller v. Clark*, 37 Iowa, 325; *Kern v. Chalfant*, 7 Minn. 487; *Kendig v. Marble*, 58 Iowa, 529.

<sup>5</sup> *Johnston v. McAusland*, 9 Abb. Pr. 214; *Clements v. Gerow*, 1 Keyes, 297; reversing 30 Barb. 325; *Frost v. Koon*, 30 N. Y. 428.

<sup>6</sup> *Davis v. Morris*, 21 Barb. 152; *Stebbins v. East Society*, 12 How. Pr. 410; *Daly v. Matthews*, 20 How. Pr. 267.

<sup>7</sup> *Frost v. Koon*, 30 N. Y. 428.

made, nor how the balance was ascertained.<sup>1</sup> For like reasons, it is not sufficient to state that a demand sued upon "was given the plaintiff for the balance due on settlement,"<sup>2</sup> or "is a balance due to said plaintiff of various sums of money loaned and advanced by him to me, the said defendant, during a period from July 1, 1886, to date, and includes interest upon such loans and advances to date."<sup>3</sup>

§ 557. **When Void, and when Voidable only.** — Whether a failure to substantially comply with a statute concerning the entry of judgments by confession without action makes a judgment void or only voidable is a question the answers to which are inharmonious. Of course, if the court did not have jurisdiction over the subject-matter of the action, or over the party against whom judgment is entered, it must be treated as void;<sup>4</sup> and if the confession is made by some one claiming to act for him, but having no authority to do so, the court has no jurisdiction over his person.<sup>5</sup> A judgment based upon a statement signed by the defendant's attorneys has been held void,<sup>6</sup> though we know not upon what ground. The only ground which we can conceive upon which such a decision can be supported is, that there was nothing to show that the defendant submitted himself to the jurisdiction of the court; but we suspect, from the authorities cited, that the court proceeded upon the ground that the statute must be strictly pursued.

A judgment may be confessed by a husband and wife, when the law of the state does not permit the entry against her of a judgment by confession, or it may purport to be the confession of partners or others jointly liable, when some one of them did not authorize the confession to be made. In either event, it is clear that the

<sup>1</sup> *Miller v. Earle*, 24 N. Y. 110.

<sup>2</sup> *Bernard & Co. v. Douglas*, 10 Iowa, 370.

<sup>3</sup> *Wood v. Mitchell*, 117 N. Y. 439.

<sup>4</sup> *Smith v. Finley*, 52 Ark. 373.

<sup>5</sup> *Spier v. Corll*, 33 Ohio St. 236;

*Conery v. Rotchford*, 34 La. Ann. 520;

*Gardner v. Bunn*, 132 Ill. 403.

<sup>6</sup> *Reynolds v. Lincoln*, 71 Cal. 183;

*French v. Edwards*, 5 Saw. 266.

judgment is void as against the person by whom its entry was not authorized. But what is its effect as against the others who submitted themselves to the jurisdiction of the court, who did all in their power to procure the entry of the judgment, and who have not sought to have it vacated? Doubtless they might have procured its vacation by a timely application;<sup>1</sup> and there are decisions asserting that the judgment is an entirety, and being void as to one defendant, that it is void as against all; and more rational decisions holding that it is valid as against the defendants before the court, until they procure it to be set aside by some appropriate proceeding.<sup>2</sup> Upon principle, we see no distinction between judgments by confession unauthorized as against some of the defendants and other judgments tainted by the same infirmity. As we have heretofore shown,<sup>3</sup> the assumption was formerly made that judgments were necessarily entireties, and therefore if void as to some of the defendants were void as to all. This assumption and the authorities bearing upon it were first carefully considered and explained by Mr. Frederick J. Brown, in an article published in the *American Law Register* for November, 1880.<sup>4</sup> The assumption and the authorities in harmony with it were shown to rest upon an early New York case, in which the question was not involved, and to be in direct conflict with well-considered decisions necessarily determining the question. At the present time, the weight of the authorities is in conformity with the conclusions reached in this article.<sup>5</sup>

There may be a material difference between judgments by confession entered by the court and those entered by the clerk in the absence of any direction from the court. Where the court acts with the parties before it and subject to its jurisdiction, the judgment which it renders and

<sup>1</sup> *Chapin v. Thompson*, 20 Cal. 681.

<sup>2</sup> *Ante*, sec. 136.

<sup>3</sup> *North v. Mudge*, 13 Iowa, 496; 81

Am. Dec. 441; *York Bank's Appeal*, 690.

<sup>4</sup> 19 Am. Law Reg., N. S., 673-

36 Pa. St. 453.

<sup>5</sup> *Ante*, sec. 136.



directs to be entered cannot, upon principle, be adjudged void. Hence such a judgment cannot be collaterally avoided on account of the absence of a statement or affidavit, or of defects therein.<sup>1</sup> If, on the other hand, the judgment is entered by the clerk, without first being directed by the court, it may be essential that every prerequisite of the statute be shown to exist, on the ground that the clerk, being a mere ministerial officer, cannot act except under the conditions prescribed by the statute.<sup>2</sup> If execution be issued, and a sale made, the title of the purchaser is not dependent on the statement's correctness in fact or perfection in form.<sup>3</sup> The insufficiency of the statement throws upon the plaintiff, in any proceeding for the purpose of setting aside the judgment, the burden of showing that it is not tainted by fraud, and that facts sufficient to authorize its entry in fact existed, though not set forth in the statement.<sup>4</sup> The plaintiff may maintain an action to set aside a fraudulent conveyance, and to subject the property therein described to the lien of his judgment, though as against other creditors it is supported by an insufficient statement.<sup>5</sup> A judgment by confession, valid in the state where entered, is valid elsewhere.<sup>6</sup> A judgment by confession is not void because entered before the debt is due or for too large a sum.<sup>7</sup> The judgment must be entered in fact, and an execution in advance of such entry is void.<sup>8</sup> In Nevada, where the clerk of the court copied the statement and affidavit in

<sup>1</sup> *Miller v. Earle*, 24 N. Y. 110; *Kirby v. Fitzgerald*, 31 N. Y. 417; *Lee v. Figg*, 37 Cal. 328; 99 Am. Dec. 271; *Cloud v. El Dorado*, 12 Cal. 133; 73 Am. Dec. 526; *Coolbaugh v. Roemer*, 30 Minn. 424; *Pond v. Davenport*, 44 Cal. 481; *Plummer v. Douglas*, 14 Iowa, 69; 81 Am. Dec. 456; *How v. Dorscheimer*, 31 Mo. 349; *Sheldon v. Stryker*, 34 Barb. 116; 21 How. Pr. 329; *Marity v. Eartridge*, 67 Ind. 211; *Chapman v. McLaren*, 105 Ind. 563; *Caley v. Morgan*, 114 Ind. 350; *Ex parte Fuller*, 1 Saw. 243; *Arnold v. McCorkle*, 6 Baxt. 301; *Harrison v.*

*Gibbons*, 71 N. Y. 58; *Neusbaum v. Keim*, 24 N. Y. 325.

<sup>2</sup> *Davidson v. Alexander*, 84 N. C. 621; *Gardner v. Bunn*, 132 Ill. 403; *Tucker v. Gill*, 61 Ill. 236.

<sup>3</sup> *Miller v. Earle*, 24 N. Y. 110.

<sup>4</sup> *Cordier v. Schloss*, 18 Cal. 576; *Richards v. McMillan*, 6 Cal. 419; 65 Am. Dec. 521.

<sup>5</sup> *Neusbaum v. Keim*, 24 N. Y. 325.

<sup>6</sup> *Coleman v. Waters*, 13 W. Va. 278.

<sup>7</sup> *Adam v. Arnold*, 86 Ill. 185.

<sup>8</sup> *Ling v. King & Co.*, 91 Ill. 571; *King v. French*, 2 Saw. 441.

the judgment-book, and added the words, "Judgment entered April 14, A. D. 1874. Attest: J. H. Job, clerk," and indorsed the same words on the back of the statement, this was adjudged to be a sufficient entry of the judgment.<sup>1</sup> A judgment by confession without action, when the statute has not been pursued, though conceded not to be absolutely void, may be avoided in various ways by persons who are not parties thereto. One whom the judgment when entered did not prejudice in any way is not entitled to impeach or avoid it. If the judgment is permitted to stand, and a sale of property is made under it, the purchaser's title cannot be impeached for defects in the statement by one who had no lien by judgment when such sale was made.<sup>2</sup> If, on the other hand, there is a junior judgment creditor, he may, upon motion, procure the vacation of the judgment on account of such defects,<sup>3</sup> although property has been sold to the plaintiff thereunder.<sup>4</sup> A junior judgment creditor may also commence a suit to set aside for fraud a judgment confessed without action,<sup>5</sup> in which case the fact that the statute was not pursued creates a presumption that the judgment is fraudulent, and therefore void as against such creditor, and imposes on the person claiming the right to retain and enforce such judgment the duty of rebutting this presumption.<sup>6</sup>

§ 558. **Defendant's Right to Relief from.**—As in the case of judgments by default, a difference of opinion is manifest in regard to the right of the defendant to question or correct the errors of the court or of its clerk. On one hand, it is asserted that a confession of judgment admits the law to be against the defendant as well as the

<sup>1</sup> *Humboldt M. & M. Co. v. Terry*, 11 Nev. 240.

<sup>2</sup> *Miller v. Earle*, 24 N. Y. 110.

<sup>3</sup> *Chappel v. Chappel*, 12 N. Y. 215; 64 Am. Dec. 496; *Bernard v. Douglas*, 10 Iowa, 370; *How v. Dorscheimer*, 31 Mo. 349; *Thompson v. Hintgen*, 11 Wis. 112.

<sup>4</sup> *Ex parte Carroll*, 17 S. C. 446.

<sup>5</sup> *Kohn v. Meyer*, 19 S. C. 190.

<sup>6</sup> *Pond v. Davenport*, 44 Cal. 481;

*Cordier v. Schloss*, 18 Cal. 576; *Richards v. McMillan*, 6 Cal. 419; 65 Am. Dec. 521; *Wilcoxson v. Burton*, 27 Cal. 229; 87 Am. Dec. 66.

facts, and "silences all contests about the law of the case."<sup>1</sup> On the other hand, "it has been held that although the confession of judgment is a waiver of formal errors, it does not prevent the defendant from objecting to errors of substance," as "that the statement required to be filed in writing in insufficient."<sup>2</sup> In New York, a judgment by confession may, after lapse of the term, be set aside for a defect in the statement, on motion of a junior judgment creditor,<sup>3</sup> or by an action in the nature of a creditor's bill.<sup>4</sup> But in California the latter is the exclusive remedy recognized.<sup>5</sup> Courts of law exercise an equitable jurisdiction over judgments entered by confession upon notes and warrants of attorney, and it is necessary to justice that they should liberally exercise that jurisdiction, and may therefore, on application of the defendant, vacate them and permit him to make a defense on the merits,<sup>6</sup> or may, when they are entered for a sum in excess of that authorized by the warrant, grant relief as to such excess.<sup>7</sup> Where it clearly appears that the plaintiff was not entitled to the judgment on the notes and warrants of attorney, the court should vacate the judgment and leave him to pursue the ordinary remedy by action. But where the case is involved in doubt, or the testimony is so contradictory that the truth cannot be ascertained with reasonable certainty, the defendant should be let into a defense on the merits, the judgment in the mean time being allowed to stand as security until the merits of the case are heard and determined, all proceedings

<sup>1</sup> *Bonta v. Clay*, 1 Litt. 27; *Jeffries v. Morgan*, 1 Pike, 169; *Rush v. Halcyon*, 67 N. C. 47; *Garner v. Burleson*, 26 Tex. 348; *Hearn v. State*, 62 Ala. 218.

<sup>2</sup> *Montgomery v. Barnett*, 8 Tex. 143; *Edgar v. Greer*, 7 Iowa, 136; *Kennedy v. Lowe*, 9 Iowa, 580; *Hopkins v. Howard*, 12 Tex. 7.

<sup>3</sup> *Chappel v. Chappel*, 12 N. Y. 215; 64 Am. Dec. 496; *Rae v. Lawser*, 18 How. Pr. 23; *Bonnell v. Henry*, 13

How. Pr. 142; *Bernard & Co. v. Douglas*, 10 Iowa, 370.

<sup>4</sup> *Dunham v. Waterman*, 17 N. Y. 9; 72 Am. Dec. 406.

<sup>5</sup> *Arrington v. Sherry*, 5 Cal. 513. See also *Sharp v. Danville R. R. Co.*, 106 N. C. 308; 19 Am. St. Rep. 533.

<sup>6</sup> *McAllister's Appeal*, 59 Pa. St. 204; *Heeney v. Alcock*, 9 Ill. App. 431; *Stein v. Good*, 115 Ind. 93; *McCabe v. Sumner*, 40 Wis. 336.

<sup>7</sup> *Adam v. Arnold*, 86 Ill. 185.

upon it, however, being stayed until the suit is finally decided.<sup>1</sup> The court ought not, where the case shown renders it proper to permit the defendant to contest the plaintiff's claim, to require, as a condition of permitting such contest, that the defendant first bring into court the sum supposed to be due.<sup>2</sup>

§ 558 a. **The Effect of Judgments by Confession.**—The effect of a judgment by confession is not substantially different from that of a judgment entered in a contested litigation. It is supported by the same presumptions.<sup>3</sup> Neither the defendant nor persons acquiring title to his property subsequently to the entry of the judgment can collaterally impeach or avoid it by showing that it was entered without consideration, or founded upon an illegal consideration,<sup>4</sup> or an obligation tainted by usury,<sup>5</sup> nor can they otherwise destroy its force as *res judicata*.<sup>6</sup> Strangers to the judgment may impeach it on the same grounds as other judgments are impeachable upon, and may therefore show that it was given and accepted for the purpose of hindering, delaying, or defrauding creditors, or forcing them to make a compromise,<sup>7</sup> or may show that its date or recitals are not true,<sup>8</sup> but cannot impeach it for fraud practiced on the debtor in obtaining his confession, where there was no collusion between him and his creditor.<sup>9</sup> The defendant himself is precluded from obtaining any relief, if it appears that his object in confessing the judgment was to defraud his creditors.<sup>10</sup> A judgment by

<sup>1</sup> *Waher v. Ensign*, 1 Ill. App. 113; *Condon v. Besse*, 86 Ill. 159.

<sup>2</sup> *Page v. Wallace*, 87 Ill. 84.

<sup>3</sup> *Caley v. Morgan*, 114 Ind. 350; *Allen v. Norton*, 6 Or. 344; *Gibboney v. Gibboney*, 2 Ill. App. 322; *Shadrack v. Woolfolk*, 32 Gratt. 707; *Kendig v. Marble*, 58 Iowa, 529.

<sup>4</sup> *Shufelt v. Shufelt*, 9 Paige, 137; 37 Am. Dec. 381.

<sup>5</sup> *Twogood v. Pence*, 22 Iowa, 543.

<sup>6</sup> *Wood v. Bagley*, 12 Ired. 83; *Brad-*

*dee v. Brownfield*, 4 Watts, 474; *Sechrist v. Zimmerman*, 55 Pa. St. 446; *Weikel v. Long*, 55 Pa. St. 238; *Goff v. Dabba*, 4 Baxt. 300; *Apperson v. Gogen*, 3 Ill. App. 48; *Davidson v. Alexander*, 84 N. C. 621.

<sup>7</sup> *Bunn v. Ahl*, 29 Pa. St. 387; 72 Am. Dec. 639.

<sup>8</sup> *Schuster v. Rader*, 13 Col. 329.

<sup>9</sup> *Dougherty's Estate*, 9 Watts & S. 189; 42 Am. Dec. 326.

<sup>10</sup> *Shallcross v. Deats*, 43 N. J. L.

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confession, whether made by defendant personally, or by some one acting under a warrant of attorney granted by him, is entitled to the same faith and credit in other states as it has in the state wherein it was entered.<sup>1</sup>

<sup>1</sup> *Sipes v. Whitney*, 30 Ohio St. 69; *Kingman v. Paulson*, 126 Ind. 507; 22 *Coleman v. Waters*, 13 W. Va. 278; *Am. St. Rep.* 611.  
*Nichols v. Farwell*, 24 Neb. 180;

## CHAPTER XXVI.

## JUDGMENTS OF OTHER STATES.

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§ 559. **Constitutional and Legislative Provisions.**—A judgment of any of the courts of any state of the American Union would, beyond the limits of the state in which it was pronounced, be regarded as a foreign judgment, were it not for the provisions of section 1, article 4, of the constitution of the United States,<sup>1</sup> and of an act of Con-

<sup>1</sup> The section of the constitution referred to is as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall

gress passed May 26, 1790, and reincorporated in the Revised Statutes. It was for a while insisted by some of the state courts that these provisions were not designed to do more than secure the admission of judgments in evidence, and to regulate the form and manner in which they should be authenticated; and no greater effect was for some time in some parts of the Union given to a judgment or decree pronounced in another state than if it were pronounced by a tribunal in some foreign country.<sup>1</sup> The supreme court of the United States, in a decision which, since its promulgation, has been adopted throughout the Union, declared that the act gave to the record of every judgment, when duly authenticated and offered in evidence in another state, the same faith and credit to which it was entitled in the state whence it was taken; that if in such state it had the faith and credit of evidence of the highest nature,—viz., record evidence,—then it must have the same faith and credit in every other state.<sup>2</sup> The case in which this decision was pronounced apparently involved a mere question of pleading. In an action of debt brought in the District of Columbia upon a judgment of the supreme court of the state of New York, the defendant had interposed the plea of *nil*

be proved, and the effect thereof." Section 905 of the present Revised Statutes of the United States first provides for the mode of authentication, and then declares that "the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

<sup>1</sup> *Hammon v. Smith*, 1 Brev. 110; *Lambkin v. Nance*, 2 Brev. 99; *Bartlett v. Knight*, 1 Mass. 401; 2 Am. Dec. 36; *Hitchcock v. Aicken*, 1 Caines, 460; *Taylor v. Bryden*, 8 Johns. 173; *Pawling v. Bird's Ex'rs*, 13 Johns. 192.

<sup>2</sup> *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 3 Wheat. 234; *McElmoyle v. Cohen*, 13 Pet. 312; *Borden v. Fitch*, 15 Johns. 121; 8 Am. Dec. 225; *Andrews v. Montgomery*, 19 Johns. 162; 10 Am. Dec. 213; *Ran-*

*dolph v. Keiler*, 21 Mo. 557; *Evans v. Instine*, 6 Ohio, 117; *Burns v. Belknap*, 22 Vt. 419; *Fullerton v. Horton*, 11 Vt. 425; *Hoxie v. Wright*, 2 Vt. 269; *Davis v. Connelly's Ex'r*, 4 B. Mon. 136; *Hensley v. Force*, 12 Ark. 756; *Buchanan v. Port*, 5 Ind. 264; *McJilton v. Love*, 13 Ill. 486; 54 Am. Dec. 449; *Sharman v. Morton*, 31 Ga. 4; *Butcher v. The Bank*, 2 Kan. 70; 83 Am. Dec. 446; *Thompson v. Emmert*, 15 Ill. 415; *Lawrence v. Jarvis*, 32 Ill. 304; *Duvall v. Fearson*, 18 Md. 502; *Pritchett v. Clark*, 3 Harr. (Del.) 241; *Taylor v. Barron*, 30 N. H. 78; 64 Am. Dec. 281; *Fletcher v. Ferrel*, 9 Dana, 372; 35 Am. Dec. 143; *McMillan v. Lovejoy*, 115 Ill. 498; *Richards v. Barlow*, 140 Mass. 218; *Weir v. Vail*, 65 Cal. 466; *Eastern T. B. v. Beebe*, 53 Vt. 177; 38 Am. Rep. 665; *Smith v. Lathrop*, 44 Pa. St. 326; 84 Am. Dec. 448.

*debet*, and his plea had, upon demurrer, been adjudged bad. Mr. Justice Story delivered the opinion of the court. He first took care to remark that the defendant had had full notice of the action in which the judgment sued upon was rendered, and had in that action been arrested and had given bail, and that the judgment must therefore be conclusive upon him. He then proceeded as follows: "But it is said that, admitting that the judgment is conclusive, still *nil debet* was a good plea; and *nul tiel record* could not be pleaded, because the record was of another state, and could not be inspected or transmitted by *certiorari*. Whatever may be the validity of the plea of *nil debet* after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*; and when Congress gave the effect of a record to the judgment, it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection by the court of its own record, or as exemplification would be in any other court of the same state. Had this judgment been sued in any other court of New York, there is no doubt that *nil debet* would have been an inadmissible plea. Yet the same objection might be urged that the record could not be inspected. The law, however, is undoubted that an exemplification would in such case be decisive. The original need not be produced. Another objection is, that the act cannot have the effect contended for, because it does not enable the courts of another state to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other court of the same state where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. Its judgments may be com-



plete and perfect, and have full effect, independent of the right to issue execution. The last objection is, that the act does not apply to courts of this district. The words of the act afford a decisive answer, for they extend 'to every court within the United States.' Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *prima facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in Congress to give a conclusive effect to such judgments, and we can perceive no rational interpretation of the act of Congress unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision."<sup>1</sup>

It is now well settled, in harmony with *Mills v. Duryee*, that every plea to an action on a judgment of another state must correspond in dignity with the record sued upon. While upon the one side a judgment having the dignity of a record cannot be met by a plea of *nil debet*, so also a judgment not regarded as a record cannot be contested under the plea of *nul tiel record*. Hence this latter plea is not proper when an action is brought upon the judgment of a justice of the peace, or of any inferior tribunal which is not a court of record.<sup>2</sup> In an action upon a decree for the payment of a specific sum of money, it was held that neither *nil debet* nor *nul tiel record* was a proper plea; that the former was bad, because under it everything is thrown open and the merits may be contested; and that the latter was equally inadmissible and inappropriate, because the proceedings in courts of chancery are not records. "It is to be observed," said the court, "that in the case before the court the plaintiff's declaration does not call the decree in chancery a record, and if the defendant intended to deny that any such decree existed, he might have

<sup>1</sup> *Mills v. Duryee*, 7 Cranch, 484.

<sup>2</sup> *McElfrick v. Taft*, 10 Bush, 160.

framed his plea so as to meet the averment in the declaration; and the tender of the issue should have concluded to the country, according to the case in *Yelverton*."<sup>1</sup> Decrees of courts of equity, as well as judgments at law, are within the protection of the constitutional and statutory provisions to which we have referred. Hence an action may be maintained in one state upon a decree rendered in another directing the payment of a specific sum of money.<sup>2</sup> Neither a judgment nor a decree can be directly enforced beyond the state in which it was entered. The effect of process thereon is restricted to the state in which it is issued; and the benefit of a judgment or decree, outside of the state by whose court it was pronounced, can be secured only by some action thereon, or by presenting it as a defense in some action, or by offering it in evidence to control the determination of some issue upon which it is relevant.<sup>3</sup>

§ 560. *Jurisdictional Inquiries.* — The language of the supreme court in *Mills v. Duryee*, which, substantially, was but a quotation from the act of 1790, that a judgment must, in every state, be given the same faith and credit to which it is entitled where it was rendered, was so comprehensive and distinct as to seem to negative the existence of *any* exception to the broad rule here laid down, and to impart to such a judgment in all cases and in all localities the full effect of a domestic judgment. Hence, in a number of state courts, the act of 1790 has been strictly construed, and no defense whatever has been entertained in an action upon the judgment or decree of a sister state, which would have been rejected if offered in a like action brought in the state where the judgment

<sup>1</sup> *Evans v. Tatem*, 9 Serg. & R. 252; 11 Am. Dec. 717; *Doughty v. Fawn*, Yelv. 226; *Baxley v. Linah*, 16 Pa. St. 248; 55 Am. Dec. 494.

<sup>2</sup> *Howard v. Howard*, 15 Mass. 196; *McKein v. Odom*, 12 Mo. 94; *Fletcher v. Ferrel*, 9 Dana, 372; 35 Am. Dec. 143.

<sup>3</sup> *Elizabethtown S. L. v. Gerber*, 34 N. J. Eq. 130; *McLure v. Benceni*, 2 Ired. Eq. 513; 40 Am. Dec. 437; *Turley v. Dreyfus*, 35 La. Ann. 510; *Weaver v. Cressman*, 21 Neb. 675; *Carter v. Bennett*, 6 Fla. 214.

was rendered, even though such defense tendered an issue in relation to the jurisdiction of the court in the original action. Especially where the record contained clear and positive jurisdictional recitals has the defendant been denied the right to controvert those recitals, unless they would be proper subjects of controversy in similar proceedings in the jurisdiction in which they were made.<sup>1</sup>

§ 561. **Cases Denying the Right to Inquire into Jurisdiction.**—In some states the broad ground is maintained that in all cases, if to escape the judgment where it was rendered the party must show want of jurisdiction on the face of the record, he cannot escape it by any other means in any other state.<sup>2</sup> Now, the act of Congress already mentioned, after providing the mode of authentication, declares that “the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are, or shall be taken.” In some of the states, a record, silent on the subject of jurisdiction, is, when collaterally assailed, supported by incontrovertible jurisdictional presumptions. In other states, while less effect is given to mere *presumptions* of jurisdiction, record, declarations, and recitals upon this subject are regarded as of that high “and uncontrollable verity which admits of no plea or proof to the contrary.” Whenever a judgment of either of these states is made the basis of an action, or employed for any other legitimate object, in another state, it, according to the act of

<sup>1</sup> *Hensley v. Force & Co.*, 12 Ark. 756; *Bimeler v. Dawson*, 4 Scam. 536; 39 Am. Dec. 430; *Westcott v. Brown*, 13 Ind. 83; *Lawrence v. Jarvis*, 32 Ill. 309; *Westerwelt v. Lewis*, 2 McLean, 511; *Spencer v. Brockway*, 1 Ohio, 359; 13 Am. Dec. 615; *Thompson v. Emmert*, 4 McLean, 96; *Lapham v. Briggs*, 27 Vt. 26; *Lincoln v. Tower*, 2 McLean, 473; *Roberts v. Caldwell*, 5 Dana, 512; *Jacquette v. Hugunon*, 2 McLean, 129; *May v. Jameson*, 11 Ark. 368; *Wilcox v. Kassick*, 2 Mich. 165; *Pritchett v. Clark*, 5 Harr. (Del.) 63; 4 Harr. (Del.) 280; *Warren v. Lusk*, 16 Mo. 102; *Harbin v. Chiles*, 20 Mo. 314; *Newcomb v. Peek*, 17 Vt. 302; 44 Am. Dec. 340; *Logansport Gas Co. v. Knowles*, 2 Dill. 421; *Wetherill v. Stillman*, 65 Pa. St. 105.

<sup>2</sup> *Lapham v. Briggs*, 27 Vt. 26; *Wetherill v. Stillman*, 65 Pa. St. 105.

1790, should have such faith and credit given to it as by law or usage would be accorded to it under like circumstances in the state whence it is taken. In the act there is no more authority for disputing its direct or implied jurisdictional adjudications than there is for denying its effect upon an issue by it determined on the merits, or its operation as a merger or extinguishment of the original cause of action. But it was soon perceived that a man living at one extremity of the Union might be made the subject of judicial proceedings prosecuted at another extremity; and that through a presumption very different from the real facts, or from direct statements incorporated in the record and as false as they were explicit, he might be subjected to great wrong,—a wrong from which he could escape, if at all, only by such proceedings as would be available to him if he were a resident within the state where the wrong was perpetrated. Under the construction to the fourteenth amendment to the constitution of the United States, given in several recent cases,<sup>1</sup> it would seem that all questions regarding the jurisdiction of courts over the persons against whom they pronounce judgment must ultimately be determined in the national courts, or at least according to the principles there recognized and applied; and therefore, the wide dissimilarity heretofore existing in the different states respecting jurisdictional presumptions and recitals must ultimately disappear. If so, the difficulty of conceding in every state to each judgment the faith and credit to which it is entitled in the state where pronounced will be very materially diminished.

**§ 562. Cases Holding that Jurisdiction is Always Open to Investigation.**—A proper regard for the inconvenience and injustice likely to ensue from giving effect to the letter of the law should have resulted in the exercise of the legislative authority vested in Congress, and by means

<sup>1</sup> *Belcher v. Chambers*, 53 Cal. 635; *Pennoyer v. Neff*, 95 U. S. 714.

of which the existing statute could be so modified as to efface its objectionable features. But the necessity of such an amendment has been overcome by judicial construction or judicial legislation, under which the whole question of the jurisdiction of the court pronouncing the judgment is always liable to be reopened at the option of the person against whom such judgment is asserted in another state. A judgment record of another state is therefore at present, in many of the states, of no greater effect than a foreign judgment upon jurisdictional issues; the jurisdiction of the court in both cases being open to inquiry.<sup>1</sup> "The cases are obviously irreconcilable, and something may be said on either side. If the statutory provision that a judgment shall have the same faith and credit as in the state where it was rendered extends to the proceedings of the court as set forth of record, a denial of notice or of the authority of the attorney will be as inadmissible in a suit on the judgment of another state as it confessedly is when the action is based on a domestic judgment. If, on the other hand, the design of the constitution, as interpreted by the statute, is that the judgment should not be conclusive unless the court had jurisdiction of the cause and the parties, there will always be room for the preliminary inquiry whether the defendant was notified or appeared voluntarily without process. Between these views there is, seemingly, no

<sup>1</sup> *Kerr v. Kerr*, 41 N. Y. 272; *Kane v. Ferris*, 5 *Houst.* 34; *Thorn v. Salmonson*, 37 *Kan.* 441; *Sevier v. Roddie*, 51 *Mo.* 580; *Jones v. Jones*, 106 N. Y. 415; 2 *Am. St. Rep.* 447; *Bailey v. Martin*, 119 *Ind.* 103; *Marx v. Fore*, 51 *Mo.* 69; 11 *Am. Rep.* 432; *Noble v. Thompson Oil Co.*, 79 *Pa. St.* 354; 21 *Am. Rep.* 66; *Zepp v. Hager*, 70 *Ill.* 223; *Wright v. Andrews*, 130 *Mass.* 149; *Gillespie v. Commercial Ins. Co.*, 12 *Gray*, 201; 71 *Am. Dec.* 743; *Grover & B. S. M. Co. v. Radcliffe*, 66 *Md.* 511; *O'Rourke v. Chicago etc. R'y Co.*, 55 *Iowa*, 332; *Finneran v. Leonard*, 7 *Allen*, 54; 83 *Am. Dec.* 665; *Folger v. Columbian Ins. Co.*, 99 *Mass.* 267; 96 *Am. Dec.* 747.

middle ground, and the balance of convenience inclines strongly in favor of the latter doctrine."<sup>1</sup> The effect of the provisions of the act of 1790 upon this very material question being thus involved in the doubt, there resulted a large number of adjudged cases, opposite in the nature of the conclusions announced, and very nearly equal in the numbers opposed to each other; and this doubt and dissension could be removed only by the decisions of the supreme court of the United States. We shall, in the next section, show that the question has at last been finally solved, and that the solution reached leaves the judgments of courts of sister states always subject to attack on jurisdictional grounds.

**§ 563. Effect of Recitals and Averments in the Records.**

—The general recital that the defendant appeared is, even in those states where direct jurisdictional statements are regarded as conclusive, susceptible of explanation and avoidance by showing that the appearance was by an unauthorized attorney. It is also thought to involve no contradiction of the record to show that the attorney whom it declares appeared for the defendant had no authority so to do.<sup>2</sup> "In these instances, however, and others of a like kind, the courts have relied on the well-known rule that estoppels must be certain, as a reason for admitting evidence that might have been shut out by a clear and positive recital. There was said to be no direct or necessary conflict between an averment on the one part that the defendant appeared, and proof on the other that the appearance was by an attorney who did not represent the defendant. And there has been a manifest reluctance to go beyond this, and assume the responsibility of holding that an unequivocal allegation that the defendant was

<sup>1</sup> 2 Am. Lead. Cas., 5th ed., 646. Am. Rep. 646; *Koonce v. Butler*, 84  
<sup>2</sup> *Lawrence v. Jarvis*, 32 Ill. 304; N. C. 221; *Sherrard v. Nevius*, 2 Ind.  
*Baltzell v. Nozler*, 1 Iowa, 588; 63 Am. 241; 52 Am. Dec. 508; *Welch v. Sykes*,  
Dec. 466; *Price v. Ward*, 25 N. J. L. 3 Gilm. 197; 44 Am. Dec. 689; *Harshey*  
225; *Arnott v. Webb*, 1 Dill. 362; v. *Blackmarr*, 20 Iowa, 661; 69 Am.  
*Gilman v. Gilman*, 126 Mass. 26; 30 Dec. 520.

served personally, or entered a personal appearance, can be disproved by parol evidence."<sup>1</sup> Nevertheless, numerous cases exist in which the authority to controvert the truth of unequivocal allegations found in the record in regard to jurisdiction is affirmed in express terms or by necessary implication.<sup>2</sup> There is now no doubt that "a defendant sued here upon a judgment recovered against him in a court of record of another state, in which it is recited that he was served with process or appears by attorney, may controvert such recital, and show that he was not served with process, was not in any manner brought into court, had not submitted himself to its jurisdiction, or appeared therein by attorney or otherwise."<sup>3</sup> The rule is the same when, instead of contradicting a mere jurisdictional recital, the defendant undertakes to show that the return of service indorsed on the summons is false.<sup>4</sup> In the case of *Christmas v. Russell*, 5 Wall. 305, the supreme court of the United States stated that the judgments of a state court "are open to inquiry as to the jurisdiction of the court and notice to the defendant." This question was not, however, involved in the case then under consideration, and this statement was made by way of illustration, rather than of decision. But at a later day the decision of the precise question became necessary, and resulted in the affirmance of the rule that the jurisdiction of the court may be assailed even in direct opposition to

<sup>1</sup> 2 Am. Lead. Cas., 5th ed., 643. See also *ante*, sec. 560.

<sup>2</sup> *Finneran v. Leonard*, 7 Allen, 54; 86 Am. Dec. 665; *Norwood v. Cobb*, 15 Tex. 500; *Rape v. Heaton*, 9 Wis. 328; 76 Am. Dec. 269; *Kerr v. Kerr*, 41 N. Y. 272; *Starbuck v. Murray*, 5 Wend. 148; 21 Am. Dec. 172; *Noyes v. Butler*, 6 Barb. 613; *Norwood v. Cobb*, 24 Tex. 551; *Kane v. Cook*, 8 Cal. 449; *Hoffman v. Hoffman*, 46 N. Y. 30; 7 Am. Rep. 299; *Pollard v. Baldwin*, 22 Iowa, 328; *Carleton v. Bickford*, 13 Gray, 591; 74 Am. Dec. 652; *McDermott v. Clay*, 107 Mass. 501; *Marx v. Fore*, 51 Mo. 69; 11 Am. Rep.

432; *Easley v. McClinton*, 33 Tex. 288; *Aldrich v. Kinney*, 4 Conn. 380; 10 Am. Dec. 151; *Brown v. Eaton*, 98 Ind. 591; *Wood v. Wood*, 78 Ky. 624; *Thorn v. Salmonson*, 37 Kan. 441; *Napton v. Leaton*, 71 Mo. 358; *Chaney v. Bryan*, 15 Lea, 589; *Kingsbury v. Yniestra*, 59 Ala. 320; *Frothingham v. Barnes*, 9 R. I. 474.

<sup>3</sup> *Kingsbury v. Yniestra*, 59 Ala. 320; *People v. Dawell*, 25 Mich. 247; 12 Am. Rep. 260; *Bowler v. Huston*, 30 Gratt. 266; 32 Am. Rep. 673.

<sup>4</sup> *Webster v. Hunter*, 50 Iowa, 215; *Lowe v. Lowe*, 40 Iowa, 220.

the recitals in the record;<sup>1</sup> and very soon afterwards the same court determined that parol evidence was admissible

<sup>1</sup> *Thompson v. Whitman*, 18 Wall. 457; 1 Cent. L. J. 308. This was an action in the circuit court of the southern district of New York, brought by Whitman, a citizen of New York, against Thompson, sheriff of Monmouth County, New Jersey, for taking and carrying away the sloop *Anna Whitman*, and her cargo, furniture, and apparel. The sheriff, to justify the taking, pleaded that the plaintiff, a resident of New York, was raking and gathering clams with his sloop, in Monmouth County, at the time of its seizure, contrary to the laws of New Jersey, and that the defendant, as sheriff, and under and by virtue of said laws, seized the sloop within the limits of said county, and informed against her before two justices of the peace, by whom she was condemned and ordered sold. The plaintiff took issue on this plea by denying that the seizure was in Monmouth County. On the trial the defendant produced a record of the proceedings before the justices, which stated the offense to have been committed and the seizure to have been made within that county. The court instructed the jury that this record was *prima facie* evidence only of the jurisdictional facts stated therein. The jury found specially that the seizure was made in New Jersey, but not in Monmouth County, and further, that the plaintiff was not on the day of the seizure engaged in taking clams in that county. Judgment having been entered for the plaintiff, the defendant prosecuted his writ of error to the supreme court of the United States. Mr. Justice Bradley, in delivering the opinion of that court, conceded that the record stated "with due particularity sufficient facts to give the justices jurisdiction under the law of New Jersey," and that the judgment must be reversed unless "that statement could be questioned collaterally in another action brought in another state." He then proceeded to the consideration of the constitution and statutes upon the subject, and the previous decisions made thereunder, and in so doing said: "Without that provision of the constitution of the United States which declares

that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,' and the act of Congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices of Monmouth County jurisdiction, whatever might be its effect in New Jersey. In any other state it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or thing. 'Upon principle,' says Chief Justice Marshall, 'it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn as prize of war a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence': *Rose v. Himely*, 4 Cranch, 269. To the same effect, see *Story on the Constitution*, c. 29; 1 Greenl. Ev., sec. 540.

"The act of Congress above referred to, which was passed the 26th of May, 1790, after providing for the mode of authenticating the acts, records, and judicial proceedings of the states, declares: 'And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records



to contradict the return of service indorsed by a sheriff on the summons in the case.<sup>1</sup>

are or shall be taken.' It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other state, or at least of giving to them in every other state the same effect in all respects which they have in the state where they are rendered. And the language of this court in *Mills v. Duryee*, 7 Cranch, 484, seemed to give countenance to this idea. The court in that case held that the act gave to the judgments of each state the same conclusive effect as records in all the states as they had at home, and that *nil debet* could not be pleaded to an action brought thereon in another state. This decision has never been departed from in relation to the general effect of such judgments, where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story, who pronounced the judgment in *Mills v. Duryee*, in his commentary on the Constitution, section 1313, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one state in every other state, adds: 'But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it, or the right of the state itself to exercise authority over the person or the subject-matter. The constitution did not mean to confer [upon the states] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.' In the Commentary on the Conflict of Laws, section 609, substantially the same remarks are repeated, with this addition: 'It [the constitution] did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as

evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy, not the right of priority or lien which they have in the state where they are pronounced, but only that which the *lex fori* gives to them by its own laws in their character of foreign judgments.' Many cases in the state courts are referred to by Justice Story in support of this view. Chancellor Kent expresses the same doctrine in nearly the same words in a note to his Commentaries, vol. 1, p. 281. See also vol. 2, p. 95, note, and cases cited. 'The doctrine in *Mills v. Duryee*,' says he, 'is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another state is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the cause, but of the parties, and in that case the judgment is final and conclusive.' The learned commentator adds, however, this qualifying remark: 'A special plea in bar of a suit on a judgment in another state, to be valid, must deny by positive averments every fact which would go to show that the court in another state had jurisdiction of the person or of the subject-matter.'

"In the case of *Hampton v. McConnell*, 3 Wheat. 234, this court reiterated the doctrine of *Mills v. Duryee*, that 'the judgment of a state court should have the same credit, validity, and effect in every other court of the United States which it had in the state courts where it was pronounced; and that whatever pleas were good to a suit therein in such state, and none others, could be pleaded in any court in the United States.' But in the subsequent case of *McElmoyle v. Cohen*, 13 Pet. 312, the court ex-

<sup>1</sup> *Knowles v. Gaslight etc. Co.*, 19 Wall. 58.

**§ 564. Jurisdiction of State Courts Confined in State Lines.** — It is said that "no sovereignty can extend its pro-

claimed that neither in *Mills v. Dur-ye* nor in *Hampton v. McConnel* was it intended to exclude pleas of avoidance and satisfaction, such as payment, statute of limitations, etc., or pleas denying the jurisdiction of the court in which the judgment was given; and quoted with approbation the remark of Justice Story, that 'the constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over person and things within the state.'

"The case of *Landes v. Brant*, 10 How. 348, has been quoted to show that a judgment cannot be attacked in a collateral proceeding. There a judgment relied on by the defendant was rendered in the territory of Louisiana in 1808, and the objection to it was that no return appeared upon the summons, and the defendant was proved to have been absent in Mexico at the time; but the judgment commenced in the usual form: 'And now at this day come the parties aforesaid, by their attorneys,' etc. The court pertinently remarked [page 371] that the defendant may have left behind counsel to defend suits brought against him in his absence, but that if the recital was false, and the judgment voidable for want of notice, it should have been set aside by *audita querela* or motion in the usual way, and could not be impeached collaterally. Here it is evident the proof failed to show want of jurisdiction. The party assailing the judgment should have shown that the counsel who appeared were not employed by the defendant, according to the doctrine held in the cases of *Shumway v. Stillman*, 6 Wend. 453; *Aldrich v. Kinney*, 4 Conn. 380; 10 Am. Dec. 151; and *Price v. Ward*, 25 N. J. L. 225. The remark of the court that the judgment could not be attacked in a collateral proceeding was unnecessary to the decision, and was, in effect, overruled by the subsequent cases of *D'Aroy v. Ketchum* and *Webster v. Reid*. *D'Aroy v. Ketchum*, 11 How. 165, was an action in the circuit court of the United States for Louisiana, brought on a judgment rendered in

New York under a local statute against two defendants, only one of whom was served with process, the other being a resident of Louisiana. In that case it was held by this court that the judgment was void as to the defendant not served, and that the law of New York could not make it valid outside of that state; that the constitutional provision and act of Congress giving full faith, credit, and effect to the judgments of each state in every other state do not refer to judgments rendered by a court having no jurisdiction of the parties; that the mischief intended to be remedied was not only the inconvenience of retrying a cause which had once been fairly tried by a competent tribunal, but also the uncertainty and confusion that prevailed in England and this country as to the credit and effect which should be given to foreign judgments, some courts holding that they should be conclusive of the matters adjudged, and others that they should be regarded as only *prima facie* binding. But this uncertainty and confusion related only to valid judgments; that is, to judgments rendered in a cause in which the court had jurisdiction of the parties and cause, or, as might have been added, in proceedings *in rem*, when the court had jurisdiction of the *res*. No effect was ever given by any court to a judgment rendered by a tribunal which had not such jurisdiction. 'The international law as it existed among the states in 1790,' say the court (page 176), 'was, that a judgment rendered in one state assuming to bind the person of a citizen of another was void within the foreign state, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction nor that of courts of justice had binding force. Subject to this established principle, Congress also legislated; and the question is, whether it was intended to overthrow this principle, and to declare a new rule which would bind the citizens of one state to the laws of another. There was no evil in this part of the existing law, and no remedy called for, and in our opinion Congress did not intend to

cess beyond its own territorial limits, to subject either person or property to its judicial decisions. Every exer-

overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the states where made."

"In the subsequent case of *Webster v. Reid*, 11 How. 437, the plaintiff claimed, by virtue of a sale made under judgments in behalf of one Johnson and one Brigham against 'the owners of half-breed lands lying in Lee County, Iowa Territory, in pursuance of a law of the territory. The defendant offered to prove that no service had ever been made upon any person in the suits in which the judgments were rendered, and no notice by publication as required by the act. This court held that as there was no service of process, the judgments were nullities. Perhaps it appeared on the face of the judgments in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published.

"In *Harris v. Hardeman*, 14 How. 334, which was a writ of error to a judgment held void by the court for want of service of process on the defendant, the subject now under consideration was gone over by Mr. Justice Daniel at some length, and several cases in the state courts were cited and approved, which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or in proceedings *in rem*, no jurisdiction of the thing. Amongst other cases quoted were those of *Borden v. Fitch*, 15 Johns. 141; 8 Am. Dec. 225; and *Starbuck v. Murray*, 5 Wend. 156; 21 Am. Dec. 172; and from the latter the following remarks were quoted with apparent approval: 'But it is contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that

its proceedings and judgment are void, and therefore the supposed record is, in truth, no record. . . . The plaintiffs, in effect, declare to the defendant the paper declared on is a record because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle.'

"The subject is adverted to in several subsequent cases in this court, and generally, if not universally, in terms implying acquiescence in the doctrine stated in *D'Arcy v. Ketcham*, 11 How. 165.

"Thus in *Christmas v. Russell*, 5 Wall. 290, where the court decided that fraud in obtaining a judgment in another state is a good ground of defense to an action on the judgment, it was distinctly stated (page 305) in the opinion that such judgments are open to inquiry as to the jurisdiction of the court and notice to the defendant. And in a number of cases in which was questioned the jurisdiction of a court, whether of the same or another state, over the general subject-matter in which the particular case adjudicated was embraced, this court has maintained the same general language. Thus in *Elliott v. Peirce*, 1 Pet. 328, 340, it was held that the circuit court of the United States for the district of Kentucky might question the jurisdiction of a county court of that state to order a certificate of acknowledgment to be corrected, and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.'

"The same views were repeated in *United States v. Arredondo*, 6 Pet. 691; *Voorhees v. Bank of United States*, 10 Pet. 475; *Wilcox v. Jackson*, 13 Pet. 511; *Shriver's Lessee v. Lynn*, 2 How. 59, 60; *Hickey's Lessee v. Stewart*, 3 How. 762; and *Williamson*

tion of authority of this sort beyond this limit is a mere nullity."<sup>1</sup> While the constitution expressly stipulates for the faith and credit to be given in each state "to the pub-

*v. Berry*, 8 How. 540. In the last case the authorities are reviewed, and the court say: 'The jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings'; and 'the rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the law of nations, the practice in chancery, or the municipal laws of states.'

"But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

"But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England, and some of the states, it is true, are held to import absolute verity, as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extraterritorial force.

"It may be observed that no courts have more decidedly affirmed the doctrine that want of jurisdiction may be shown by proof to invalidate the judgments of the courts of other states than have the courts of New Jersey. The subject was examined and the doctrine affirmed, after a careful review of the cases, in the case of *Moulin v. Insurance Co.*, 24 N. J. L. 222, and again, in the same case, in 25 N. J. L. 57, and *Price v. Ward*, 25 N. J. L. 225, and as lately as November, 1870, in the case of *Mackay v. Gordon*, 34 N. J. L. 286. The judgment of Chief Justice Beasley in the last case is an able exposition of the law. It was a case similar to that of *D'Arcy v. Ketchum*, in 11 Howard, being a judgment rendered in New York under the statutes of that state, before referred to, against two persons, one of whom was not served with process. 'Every independent government,' says the chief justice, 'is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But in the exercise of this power, no government, if it desires extraterritorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus a judgment by the court of a state against a citizen of such state, in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign state.'

"On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the constitution, and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." Reaffirmed, *Knowles v. Gaslight etc. Co.*, 19 Wall. 58.

<sup>1</sup> Story's Conflict of Laws, sec. 539.

lic acts, records, and judicial proceedings of every other state," and that "Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, *and the effect thereof*," it is not probable that in passing the act of 1790 any intention existed of extending the judicial authority of any of the states over citizens of other states not voluntarily coming within the state in which the original suit is conducted. "The jurisdiction of state courts is limited by state lines, and, upon principle, it is difficult to see how an order of a court, served upon a party out of the state in which it is issued, can have any greater effect than knowledge brought home to the party in any other way."<sup>1</sup>

"It is a well-settled principle of law in the decisions in England and this country, and acquiesced in by the jurists of all civilized nations, that immovable property, known to the common law as real estate, is exclusively subject to the laws and jurisdiction of the courts of the nation or state in which it is located. No other laws or courts can affect it." Therefore a judgment or decree rendered in one state cannot, of itself, affect the title to lands in another state.<sup>2</sup> This is equally true, whether it declares a lien, adjudges a transfer fraudulent, directs a sale or conveyance, or otherwise seeks to transfer or divest such title.<sup>3</sup> Though a judgment or decree directs a conveyance to be made, and appoints an officer of the court to execute it, its effect, when executed, is limited territorially by the territorial jurisdiction of the court, and hence is inoperative in another state.<sup>4</sup> A judgment or decree may, however, indirectly affect the title to lands situate in another state, because it binds the litigants per-

<sup>1</sup> *Ewer v. Coffin*, 1 Cush. 23; 48 Am. Dec. 587; *Reber v. Wright*, 68 Pa. St. 471; *ante*, sec. 120 a.

<sup>2</sup> *Davis v. Headley*, 22 N. J. Eq. 115; *ante*, sec. 120.

<sup>3</sup> *Pries v. Johnson*, 1 Ohio St. 390; *Short v. Galway*, 83 Ky. 501; 4 Am. St. Rep. 168; *Morris v. Hand*, 70 Tex. 451; *Fryer v. Myers*, 13 S. W. Rep.

1025; *City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *ante*, sec. 120; *Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 621.

<sup>4</sup> *Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 621; *Page v. McKee*, 3 Bush, 135; 96 Am. Dec. 201; *Davis v. Headley*, 22 N. J. Eq. 115; *Watts v. Waddle*, 6 Pet. 389.

sonally, and establishes the matters thereby determined, so that they cannot dispute them in another state. In other words, the litigants, if within the jurisdiction of the court, may be coerced into making such conveyances, or doing such other acts as the court has decreed should be done,<sup>1</sup> or, though they do not make any conveyance, nor otherwise obey the judgment or decree, it is conclusive evidence in every other state that the acts therein required to be done should be done, and that the rights thereby established do exist and ought to be respected and enforced.<sup>2</sup>

It seems to be generally, and perhaps universally, conceded that by no means can a citizen of one state be compelled to go into another state to litigate a civil action by means of process served in his own state; and that even though process from the courts of any state be personally served beyond the limits of the state whence it issued, no personal liability against the defendant can result therefrom which will be recognized beyond the state in which the action originated.<sup>3</sup> If, then, a court of a state cannot acquire jurisdiction over a non-resident by virtue of actual service of process, nor by any means which its legislature is competent to prescribe, can it derive any authority from its own false record averments? Should not a judgment against a non-resident, not entering a voluntary appearance, always be denied any extra-territorial obligation, irrespective of the question whether the record is silent or explicit in regard to jurisdiction?

<sup>1</sup> *Newton v. Bronson*, 13 N. Y. 587; *Lans*, 388; *Dunn v. Dunn*, 4 Paige, 425; 67 Am. Dec. 89, and note; *Massie v. Watts*, 6 Cranch, 148; *Watkins v. Holman*, 16 Pet. 25.

<sup>2</sup> *Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 621.

<sup>3</sup> *Ante*, sec. 120 a; *Wilson v. Graham*, 4 Wash. C. C. 53; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 98 Am. Dec. 747; *Moulin v. Trenton Ins. Co.*, 24 N. J. L. 222; *Bradshaw v. Heath*, 13 Wend. 407; *Holmes v. Holmes*, 4

*Lans*, 388; *Dunn v. Dunn*, 4 Paige, 425; *Ilsey v. Wilson*, 1 Dev. & B. Eq. 568; *Lawrence v. Jarvis*, 32 Ill. 304; *Price v. Hickok*, 39 Vt. 292; *Weil v. Lowenthal*, 10 Iowa, 578; *Steel v. Smith*, 7 Watts & S. 447; *Hall v. Williams*, 6 Pick. 232; 17 Am. Dec. 356; *Harris v. Hardeman*, 14 How. 340; *Evans v. Instine*, 7 Ohio, 273; *Reber v. Wright*, 68 Pa. St. 471; *Lutz v. Kelly*, 47 Iowa, 307; *Pennoyer v. Neff*, 95 U. S. 714; *Cross v. Armstrong*, 44 Ohio St. 613.

And ought not the defendant to be always permitted to prove that he was a non-resident, and that he did not submit himself to the jurisdiction of the state whence the record is taken? On the other hand, if the defendant were a resident within the state when and where the record was made, the fact of his subsequent removal ought neither to impair nor to strengthen the obligation of the judgment. To whatsoever state he immigrated, the record, when produced against him, should have the effect which would be given it in like circumstances if he still resided in the state whence it was taken, and this, too, independent of the question whether it is positive, doubtful, or silent in reference to jurisdictional facts. It seems to us, then, that the only issue which ought to be tried in any state in regard to the jurisdiction of a court which has rendered a personal judgment in another state is, Was the defendant, when the suit was instituted, within the state whose court assumed to exercise authority over him? or if without the state, did he submit himself to its authority? If the issue should be answered in the negative, then the judgment ought to be disregarded, no matter how positively the record enumerates all needful jurisdictional facts. If, on the other hand, the issue be determined in the affirmative, then the record ought, upon jurisdictional as upon other questions, to have precisely "the same faith and credit given it as it had by law or usage in the courts of the state whence it was taken."

§ 565. **Jurisdiction Presumed.**—Courts of record are presumed to act only in accordance with the authority vested in them by law. Their judgments will generally be treated as conclusive on the parties until the absence of jurisdiction is affirmatively shown. These principles are almost universally recognized in regard to domestic judgments. They are, by a preponderance of the authorities, considered as applicable with equal force to judg-

ments of other states.<sup>1</sup> "It is obviously essential to the effectual operation of the design of the constitution that the records of the judgments of other states, duly authenticated under the act of Congress, should not merely prove themselves, but give rise to a presumption that the court possessed the authority which it assumed to exercise."<sup>2</sup> Where this presumption is recognized, the complaint in an action on a judgment of a court of record of a sister state need not allege that the court had jurisdiction either of the subject-matter of the action or of the person of the defendant.<sup>3</sup> But it is conceded that the question whether jurisdiction should be presumed when the record of judgment of another state fails to disclose the facts essential to its existence is not altogether free from doubt, and that in some instances this question has been determined in the negative.<sup>4</sup>

§ 566. **Coming within a State.** — We have already shown that by no means can a state compel a non-resident to come within its limits to answer a complaint in a civil action, and that if it should undertake to do so, the judgment and proceedings would not be recognized beyond its own boundaries as creating any personal obligation. But a citizen of one state, upon going voluntarily into another, submits himself to the jurisdiction of the courts of the latter. A judgment pronounced against him upon service of process upon him while temporarily

<sup>1</sup> *Hassell v. Hamilton*, 33 Ala. 280; *Gunn v. Howell*, 27 Ala. 663; 62 Am. Dec. 785; *Latterett v. Cook*, 1 Iowa, 1; 63 Am. Dec. 428; *Wilson v. Jackson*, 10 Miss. 329; *Nunn v. Sturges*, 22 Ark. 389; *McLendon v. Dodge*, 32 Ala. 491; *Scott v. Coleman*, 5 Litt. 349; 15 Am. Dec. 71; *Lincoln v. Tower*, 2 McLean, 473; *Tenney v. Townsend*, 9 Blatchf. 274; *Shumway v. Stillman*, 4 Cow. 292; 15 Am. Dec. 374; *Dodge v. Coffin*, 15 Kan. 277; *Bailey v. Martin*, 119 Ind. 103; *Buffum v. Stimpson*, 5 Allen, 591; 81 Am. Dec. 767; *Stewart v. Stewart*, 27 W. Va. 167; *Lockhart v. Locke*, 42 Ark.

17; *Mink v. Shaffer*, 124 Pa. St. 280; *Horton v. Critchfield*, 18 Ill. 133; 65 Am. Dec. 701.

<sup>2</sup> Am. Lead. Cas., 5th ed., 647, and numerous authorities there cited.

<sup>3</sup> *Phelps v. Duffy*, 11 Nev. 80; 4 Cent. L. J. 311; *Wheeler v. Raymond*, 8 Cow. 311. *Contra*, *Gebhard v. Garnier*, 12 Bush, 321; 23 Am. Rep. 721.

<sup>4</sup> *Warren v. McCarthy*, 25 Ill. 95; *Bimeler v. Dawson*, 4 Scam. 541; 39 Am. Dec. 430; *Rangely v. Webster*, 11 N. H. 299; *Commonwealth v. Blood*, 97 Mass. 538. This last case applies to decrees of divorce only.



in a state is as binding on him in every other state as it is in the state in which it was rendered.<sup>1</sup> If it appears that the defendant was not a resident of the state when and where the judgment was entered, but that his property was attached in the action, and the record recites "that it appears that defendant had been notified of the pendency of this suit," this recital will not be construed as establishing that defendant went into such state and submitted his person to its jurisdiction. The words quoted were probably designed to affirm the existence of nothing in addition to the fact that such notice was given as the laws of the state prescribed to authorize a valid judgment against the property attached.<sup>2</sup> A defendant, without going into a state, may submit himself to its jurisdiction by authorizing some one to appear for him there. In such case the judgment subsequently entered is obligatory upon him.<sup>3</sup> So if a person authorizes an action to be instituted in another state in his behalf, he becomes thereby subject to any judgment which may be taken against him in that suit.<sup>4</sup> It has been held that if a person residing in one state is induced by false representations to go into another state, in order that service of process may be there made upon him, the jurisdiction thus acquired is fraudulently obtained, and the judgment based thereon will not be enforced against him in the state where he resides;<sup>5</sup> and there seems to be no doubt that if any fraud is practiced upon the defendant whereby he is brought within the state and service of process there made upon him, he may, although he submits to the jurisdiction of the court, maintain an action against the persons who thus fraudulently induced him to leave his

<sup>1</sup> *Mowry v. Chase*, 100 Mass. 79; *Murphy v. Winter*, 18 Ga. 600; *Downer v. Shaw*, 22 N. H. 277; *ante*, sec. 120 a.

<sup>2</sup> *Downer v. Shaw*, 22 N. H. 277.

<sup>3</sup> *Walker v. Lathrop*, 6 Iowa, 516; *Hold v. Alloway*, 2 Blackf. 108.

<sup>4</sup> *Walton v. Sugg*, Phill. (N. C.) 96; 93 Am. Dec. 580.

<sup>5</sup> *Dunlap v. Cody*, 31 Iowa, 260; 7 Am. Rep. 129; *Duringer v. Moschina*, 93 Ind. 495. *Contra*, *Steele v. Bates*, 2 Aiken, 338; 16 Am. Dec. 720; *Peel v. January*, 35 Ark. 331; 37 Am. Rep. 27.

home;<sup>4</sup> or he may, on application to the court, obtain an order setting aside the service of the process.<sup>5</sup>

§ 567. **Constructive Service on Non-residents.**— Personal service being undoubtedly ineffectual to call into being such a personal judgment as will be given extra-territorial effect against a non-resident unless the service was made on him within the state, it follows, *a fortiori*, that no greater effect would be produced if the service were constructive instead of personal.<sup>6</sup> Until a comparatively recent date, the opinion extensively prevailed that judgments *in personam* entered after constructive service of process upon a non-resident, while they were not enforceable beyond the limits of the state where entered, were nevertheless so far valid in that state as to support a sale of the debtor's property situate therein. This opinion has been overthrown by the supreme court of the United States in the case of *Pennoyer v. Neff*, 95 U. S. 714. This action was brought in the circuit court of the United States for the district of Oregon, by Neff, to recover a tract of land for which he held a patent from the government. Pennoyer, the defendant below, claimed under a judgment and execution sale against Neff. The latter was a non-resident of Oregon when the judgment was procured against him *in personam* upon a demand for money due to one J. H. Mitchell. The court held this judgment to be entirely inoperative, and proceeded upon the principle that property within the state belonging to non-residents cannot be reached and applied to the satisfaction

<sup>1</sup> Cook v. Brown, 125 Mass. 503; 28 Am. Rep. 259.

<sup>2</sup> Townsend v. Smith, 47 Wis. 623; 32 Am. Rep. 793; Williams v. Reed, 29 N. J. L. 386; Baker v. Wales, 45 How. Pr. 137; 14 Abb. Pr., N. S., 331; Metcalf v. Clark, 41 Barb. 45.

<sup>3</sup> Barkman v. Hopkins, 11 Ark. 157; Whittier v. Wendall, 7 N. H. 257; Winston v. Taylor, 28 Mo. 82; 75 Am. Dec. 112; Iglehart v. Moore, 16 Ark. 46; Ryan v. Vallandigham, 25 Ill. 125; Robinson v. Ward, 8 Johns. 86; 5 Am. Dec. 327; Bartlett v. Knight, 1 Mass. 401; 2 Am. Dec. 36, and note; Chamberlain v. Faris, 1 Mo. 517; 14 Am. Dec. 304, and note; Bartlett v. Spicer, 75 N. Y. 528; Dearing v. Bank, 5 Ga. 497; 48 Am. Dec. 300; Pickett v. Ferguson, 45 Ark. 177; 55 Am. Rep. 545; Zepp v. Hager, 70 Ill. 223; Hart v. Sansom, 110 U. S. 151; Scott v. Noble, 72 Pa. St. 115; 13 Am. Rep. 663.



is not binding on him personally, there are various modes in which jurisdiction over his property within the state may be acquired, and judgments procured which will affect his interest therein. By the aid of process served beyond the state, either personally or constructively, partition may be made, when his interest is that of a co-tenant, liens may be foreclosed, fraudulent transfers vacated, specific performance of contracts of sale enforced, conflicting claims of title determined, and judgments in attachment rendered under which his property may be sold and his title vested in the purchaser.<sup>1</sup> But in none of these proceedings, unless he voluntarily appeared therein, can a judgment be obtained which can bind him personally, or be enforced against him personally in any subsequent suit or action.<sup>2</sup>

§ 568. **Non-resident Corporations.**—A corporation created under and by virtue of the laws of a particular state is, for many purposes, to be deemed and treated as a resident thereof,<sup>3</sup> and, at all events, under ordinary circumstances, it cannot be treated as existing and being within the territorial jurisdiction of another state, so as to authorize the latter to require it to appear before its courts and be subjected to judgments *in personam* against it; and a judgment against it in the courts of a state of which it is not a corporation, and to whose jurisdiction it has not submitted itself, either directly or in some mode authorized by law, has no greater effect than a judgment against a non-resident natural person.<sup>4</sup> The statutes of some of the states authorize the service of summons on a foreign corporation to be made upon some officer or agent thereof residing or being in the state in which suit is

<sup>1</sup> *Ante*, sec. 120 a.

<sup>2</sup> *Ante*, sec. 120 a; *McDermott v. Clary*, 107 Mass. 501; *Jones v. Spencer*, 15 Wis. 583; *Falk Brewing Co. v. Hirsch*, 78 Tex. 192.

<sup>3</sup> *Ohio etc. R. R. Co. v. Wheeler*, 1 Black, 286; *Bank of Augusta v. Earle*,

13 Pet. 512; *Cowles v. Mercer Co.*, 7 Wall. 118; *Louisville etc. R. R. Co. v. Letson*, 2 How. 497; *ante*, sec. 120 b.

<sup>4</sup> *Ante*, sec. 120 b; *Gilchrist v. West Virginia O. & O. C. Co.*, 21 W. Va. 115; 45 Am. Rep. 555.

brought. A service of summons on one of its agents, made in pursuance of such statute, must be regarded as a mere constructive service, and the judgment thereon as having no extraterritorial effect, unless the corporation, by doing business within the state, or in some other mode, has brought itself within the jurisdiction of the court.<sup>1</sup> A corporation is so far a citizen of the state in which it is organized that it is entitled, on being sued in the courts of another state, to remove the suit to the federal courts upon complying with the provisions of the judiciary act, and any agreement not to avail itself of this right, exacted under the provisions of a state statute as a condition of its doing business within such state, is inoperative, because "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void";<sup>2</sup> though there seems to be no doubt that any state may generally exclude a foreign corporation from doing any business within its limits, or may prescribe the conditions on which the business may be done, and may exact security for the performance of the corporate obligations entered into in such state.<sup>3</sup> There are many instances in which a foreign corporation may so submit itself to the jurisdiction of the courts of another state as to be bound by their judgments. A corporation is an artificial person; and as a natural person may subject himself to the jurisdiction of the courts of a state in which he does not reside, so may an artificial person. Persons, whether natural or artificial, may authorize actions to which they are parties to be prosecuted or defended in foreign states, and if they do so, are bound by the result. So it would seem to be competent for a state to provide, as a condition of a foreign corporation doing business within its limits,

<sup>1</sup> *Latimer v. U. P. R. R. Co.*, 43 Mo. 105; 97 Am. Dec. 378; *Huribert v. Hope M. L. Ins. Co.*, 4 How. Pr. 275; *Brewster v. Michigan Cent. R. R. Co.*, 5 How. Pr. 183; *Bates v. New Orleans etc. R. R. Co.*, 13 How. Pr. 516; *ante*, sec. 120 b; *Elizabeth S. L.*

*v. Gerber*, 25 N. J. Eq. 153; note to *Hampson v. Weare*, 66 Am. Dec. 121; *St. Clair v. Cox*, 106 U. S. 350.

<sup>2</sup> *Insurance Co. v. Morse*, 20 Wall. 445; *Railway Co. v. Whitton*, 13 Wall. 270.

<sup>3</sup> *Paul v. Virginia*, 8 Wall. 163.

that it should consent to be sued there, and that the service of process on some of its agents should be valid; and further, that by doing business within such state the corporation is deemed to assent to such law and the conditions by it imposed, provided that such conditions are not repugnant to the constitution and laws of the United States.<sup>1</sup> A judgment against a foreign corporation which has thus brought itself within the jurisdiction of the state in which the judgment is entered is entitled to that full faith and credit elsewhere which is accorded to it where it is pronounced.<sup>2</sup>

§ 569. **Jurisdiction Acquired may be Continued by Constructive Service.**—But if a court acquires jurisdiction over the parties, the courts of the same state may proceed until the final termination of the controversy, although one of the parties is a non-resident. Thus if a resident of one state submits himself to the jurisdiction of a subordinate court of another state, he may be brought as respondent before the appellate courts, although the process or notice required to compel him to appear in the higher court cannot be served upon him within the state. If it were otherwise, a party unjustly prevailing in the subordinate court could retain his advantage by remaining without the state. The appeal or writ of error must be regarded, not as a new suit, but rather as the continuation of an old one. Whether a non-resident respondent be brought into the appellate court by means of actual or constructive notice, a judgment will be as binding on him in other states as the judgment of the inferior court would have been if it had been against him.<sup>3</sup> So if, after

<sup>1</sup> *Colorado I. W. v. Sierra G. M. Co.*, 18 Col. 499; 22 Am. St. Rep. 433; *Shickle etc. I. Co. v. Wiley Const. Co.*, 61 Mich. 226; 1 Am. St. Rep. 571; *Gross v. Nichols*, 72 Iowa, 239; *Norton v. Berlin I. B. Co.*, 51 N. J. L. 442; *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81; *St. Clair v. Cox*, 106 U. S. 350.

<sup>2</sup> *Railroad Co. v. Harris*, 12 Wall. 65; *Lafayette Ins. Co. v. French*, 18 How. 404; *ante*, sec. 120 b; *Gillespie v. Commercial Ins. Co.*, 12 Gray, 201; 71 Am. Dec. 743.

<sup>3</sup> *Nations v. Johnson*, 24 How. 195; *Cone v. Hooper*, 18 Minn. 531. See also *Sanford v. Sanford*, 28 Conn. 6; *Meyer v. Hartman*, 14 Mo. App. 130.

a judgment is entered, the defendant removes to another state, and it becomes necessary to revive it by *scire facias*, the writ may be served in the mode sanctioned by the laws of the state, and the judgment thereon will have the same effect against the defendant as if he had remained an inhabitant of the state.<sup>1</sup>

§ 570. **Constructive Service on Residents.**—In relation to the extraterritorial effect of a judgment procured against a person in the state of his domicile, in an action in which he entered no appearance, and in which the process was served constructively, in accordance with the laws of that state, radical and irreconcilable differences of opinion exist. In one case the court said: "We will treat the judgment, not as void, nor as conclusive, but simply as *prima facie*."<sup>2</sup> This is a kind of middle ground, or compromise treatment of the question; and, like most compromises, is probably less defensible, upon principle, than either of the extremes between which it is placed. The position, however, which seems to be best sustained, both by reason and by precedents, is, that each state has the authority to provide the means by which its *own citizens* may be brought before its courts; that the courts of other states have no authority to disregard the means thus provided; and finally, that every judgment or decree obtained in a state against some of its citizens, by virtue of a lawful, though constructive, service of process, should be as obligatory upon such citizen in every other state as it is in the state whence it is taken.<sup>3</sup> Nor is it

<sup>1</sup> *Adams v. Rowe*, 11 Me. 89; 25 Am. Dec. 266; *Elasser v. Haines*, 52 N. J. L. 10; *Delano v. Jopling*, 1 Litt. 117. Where, however, a judgment was entered by consent, and the defendant returned to his home in another state, after which the plaintiff moved to set it aside, serving the notice of the motion on defendant's attorney, who refused to appear, and the motion being granted, the case was put on the calendar and tried in defendant's absence, the judgment was held inoperative against

him: *Cramers v. Hawley*, 4 McCrary, 61.

<sup>2</sup> *Holt v. Alloway*, 2 Blackf. 108.

<sup>3</sup> *McRae v. Mattoon*, 13 Pick. 53; *Poorman v. Crane*, 1 Wright, 347; *Hinton v. Townes*, 1 Hill (S. C.), 439; *Spencer v. Brockway*, 1 Ohio, 259; 13 Am. Dec. 615; *Hunt v. Lyle*, 8 Yerg. 142; *Green v. Sarmiento*, 1 Pet. C. C. 74; *Buford v. Kirkpatrick*, 13 Ark. 33; *Ossidy v. Leitch*, 2 Abb. N. C. 315; *Biesenthal v. Williams*, 1 Duvall, 329; 85 Am. Dec. 629; *Harryman v. Roberts*, 52 Md. 64.

destructive of the extraterritorial effect of a judgment based on constructive service that the defendant, being a citizen of the state, was temporarily absent therefrom. It is sufficient that he was, at the time, subject to the laws of the state and to the territorial authority of the court.<sup>1</sup> Thus in a recent Massachusetts case, in which a judgment rendered in California was called in question, Wells, J., delivering the opinion of the supreme judicial court, said: "The defendant was not in California when the suit was commenced against him there, nor at any time during its pendency. No service of process or notice was ever made upon him personally. He did not appear by counsel, or otherwise, nor assent to the judgment, which was rendered upon his default of appearance. But he had been for a long time before that a citizen of California; the contract was made there; and that continued to be his legal domicile when the judgment was rendered. He was therefore, upon principles of international right, subject to the laws and to the jurisdiction of the courts of that state."<sup>2</sup>

On the other hand, it is insisted that "a merely constructive notice by publication or attachment cannot rightfully be substituted for the direct and actual warning which every man ought to have before being condemned"; "and that a sentence so pronounced is not a judgment in any just sense of the term, and should not be enforced by any court which is free from constraint."<sup>3</sup>

When an action is commenced in a state against a former resident who has recently departed therefrom with the intention of not returning, but who has not yet acquired a domicile elsewhere, the question arises whether

<sup>1</sup> *Rangely v. Webster*, 11 N. H. 299; 504; 7 Am. Rep. 551. See also, to same effect, *Gillespie v. Comm. Ins. Co.*, 12 Gray, 201; 71 Am. Dec. 743; *Morrison v. Underwood*, 5 Cush. 52; *Orcutt v. Ranney*, 10 Cush. 183.  
<sup>2</sup> *Am. Lead. Cas.*, 5th ed., pp. 654, 655; *Bowler v. Huston*, 30 Gratt. 266; 32 Am. Rep. 673.  
<sup>3</sup> *Henderson v. Staniford*, 105 Mass.

*Holt v. Alloway*, 2 Blackf. 108; *Bimeler v. Dawson*, 4 Scam. 536; 39 Am. Dec. 430; *Welsh v. Sykes*, 3 Gilm. 197; *Price v. Hickok*, 39 Vt. 292; *Gilman v. Lewis*, 24 N. J. L. 246; *Harker v. Brink*, 24 N. J. L. 333.



he has so lost his former residence that the courts of the state in which the action is pending cannot acquire jurisdiction over him. So far as we have met with any answer to this question, it has been to the effect that as soon as a citizen of a state crosses its borders, intending not to return, its courts lose their jurisdiction over his person, and cannot by any subsequent service of process acquire the power to render a judgment against him which will bind him personally in another state.<sup>1</sup>

§ 571. **By What Law Considered.** — In the consideration of jurisdictional as well as of other questions in regard to the effect to be given to a judgment of another state, the question arises, What law shall the court apply to the facts and records brought before it, when the parties fail to show the law regulating the subject in force in the state whence the record is taken? Upon one hand, it is insisted that for this purpose each state must take judicial cognizance of the laws of the other states; that as each case involving the effect of a judgment, under the constitution and laws of the United States, is liable to be heard on appeal in the United States supreme court, where judicial notice is taken of the laws of every state, it would follow that, unless the state courts also take like notice, the case would be determined in the lower court by one law, and in the appellate court by another and perhaps entirely dissimilar law;<sup>2</sup> on the other hand, it is held that, "in the absence of proof, a court could not take notice of the law of another state, and should presume that it was in accordance with their [its] own";<sup>3</sup> while a

<sup>1</sup> *Amsbaugh v. Exchange Bank*, 33 Kan. 100; *Martin v. Gray*, 19 Kan. 458; 27 Am. Rep. 149. See, however, *Ayer v. Weeks*, 65 N. H. 248; 23 Am. St. Rep. 37; *Cobb v. Rice*, 130 Mass. 231.

<sup>2</sup> *State v. Hinchman*, 27 Pa. St. 479; *Baxter v. Linah*, 16 Pa. St. 243; 55 Am. Dec. 494; *Wilson v. Jackson*, 10 Mo. 330; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *Butcher v. Bank of Brownsville*, 2 Kan. 70; 83 Am. Dec. 446; *Dodge v. Coffin*, 15 Kan. 277; *Rae v. Hulbert*, 17 Ill. 572; *Carpenter v. Dexter*, 8 Wall. 513. *Contra*, *Hanley v. Donogue*, 116 U. S. 1.

<sup>3</sup> Am. Lead. Cas. 650; *Pelton v. Platner*, 13 Ohio, 209; 42 Am. Dec. 197; *Draggoc v. Graham*, 9 Ind. 212; *Rape v. Heaton*, 9 Wis. 323; 76 Am. Dec. 269.

third view is, that in the consideration of a judgment of another state, it will be presumed, until the contrary appears, that it is governed by the rules of the common law, and a record insufficient to constitute a valid judgment under that law will be disregarded, unless its sufficiency is shown by some law of the state whence it was taken.<sup>1</sup> "No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. It is equally well-settled that the several states of the Union are to be considered as in this respect foreign to each other, and that the courts of one state are not presumed to know, and therefore not bound to take judicial notice of, the laws of another state. . . . Upon principle, therefore, and according to the great preponderance of authority, whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact."<sup>2</sup> Therefore, though the supreme court of the United States generally takes judicial notice of the laws of the several states, yet when a writ of error is prosecuted to that court from a state court, in which the effect of a judgment entered in another state is involved, the action of the state court will be determined solely by the record showing what evidence and admissions were before it, and the effect of the judgment sued upon in the state court will be determined upon the evidence or admissions respecting the law of the state in which the judgment was rendered, and not upon the judicial knowledge of the supreme court of the United States respecting such law.<sup>3</sup>

<sup>1</sup> *Hawson v. Wall*, 20 Ala. 296.

<sup>2</sup> *Hanley v. Donogue*, 116 U. S. 1; 130 Mass. 149; *Osborn v. Blackburn*, 78 Wis. 209; 23 Am. St. Rep.; *Chicago & A. R. R. Co. v. Wiggins F. Co.*, 119 U. S. 616.

*Crafts v. Clark*, 31 Iowa, 77; *Mowry v. Chase*, 100 Mass. 79; *Knapp v. Abell*, 10 Allen, 485; *Wright v. Andrews*,

<sup>3</sup> *Hanley v. Donogue*, 116 U. S. 1.

When no written law or decision is produced which shows whether a service disclosed by a record or by other proof was sufficient in the state where it was made, the testimony of experts from that state may be received to enable the court to determine whether the service was sufficient according to usage and practice of the courts of that state.<sup>1</sup> A judgment of another state, when offered in evidence, ought to be shown to be valid. If it would not be valid if rendered in the state where it is offered in evidence, the party who relies upon it must show that it is valid according to the laws of the state within whose jurisdiction it was pronounced.<sup>2</sup>

§ 572. *Jurisdiction of Subject-matter.* — It is, of course, essential to the validity of a judgment rendered in another state that the court have jurisdiction over the subject-matter of the controversy. A state can no more exercise jurisdiction over land beyond its boundaries than it can over the citizens of other states. Thus if a probate court in one state made an order under which lands of the deceased lying in another state are sold, the sale is null and void, for want of authority in the court over the land authorized to be sold.<sup>3</sup> For the same reason, a conveyance made by the officers of a court of a sister state, in pursuance of a decree of such court, was disregarded as to lands lying in another state.<sup>4</sup> While courts of one state have no jurisdiction to determine a naked question of title to lands in another state, they probably are competent to enforce a trust, irrespective of the location of the land, and to decree a conveyance, though in so doing they may be compelled to determine the question of title.<sup>5</sup> In those states in which a domestic judgment assuming to determine matters not submitted to the court by the pleadings is regarded as void, no effect will be

<sup>1</sup> *Mowry v. Chase*, 100 Mass. 79.

<sup>2</sup> *Crafts v. Clark*, 31 Iowa, 77.

<sup>3</sup> *Wilkinson v. Leland*, 2 Pet. 627.

<sup>4</sup> *Page v. McKee*, 3 Bush, 135; 24 Am. Dec. 201.

<sup>5</sup> *McGregor v. McGregor*, 9 Iowa, 65; *Massie v. Watts*, 6 Cranch, 148; *Sturdevant v. Pike*, 1 Ind. 277; *Lewis v. Darling*, 16 How. 1.

accorded a judgment rendered in another state adjudging matters outside of the issues.<sup>1</sup>

§ 573. Judgments in *Rem* will be considered in a separate chapter, in which their extraterritorial effect will be stated. But a class of judgments will be spoken of here which, though frequently styled judgments *in rem*, are simply judgments obtained by one kind of constructive service. In several of the states, process may be served by attaching the defendant's real or personal estate. The state in which the property is situate may, no doubt, authorize its seizure upon attachment; and the courts of the state may, in pursuance of state laws, exercise jurisdiction over the property, although its owner is not by any means brought within the jurisdiction of the court. The disposition made of the property attached is as final and conclusive in any state to which it may be removed as it was in the state where the judgment was entered.<sup>2</sup> But if the seizure of property is employed as a constructive service of process on the defendant, upon which a judgment *in personam* is entered, such judgment can have no greater extraterritorial force than if based upon any other constructive service.<sup>3</sup>

§ 574. Joint-debtor Acts. — A judgment against two or more joint debtors on a citation served on but one, though authorized by the laws of the state, is not binding elsewhere upon any of the defendants who were not within the state, and who did not appear in the action.<sup>4</sup>

<sup>1</sup> Reynolds v. Stockton, 43 N. J. Eq. 211; 3 Am. St. Rep. 305.

<sup>2</sup> Moore v. Spackman, 12 Serg. & R. 287; Green v. Van Buskirk, 7 Wall. 139; Hall v. Williams, 6 Pick. 232; 17 Am. Dec. 356; Molyneux v. Seymour, 30 Ga. 440; 76 Am. Dec. 662; Melhop v. Doane, 31 Iowa, 397; 7 Am. Rep. 147; *ante*, sec. 120 a.

<sup>3</sup> Arndt v. Arndt, 15 Ohio, 33; Robinson v. Ward, 8 Johns. 86; 5 Am. Dec. 327; Kilburn v. Woodworth, 5 Johns. 41; 4 Am. Dec. 321; Bates v. Delavan, 5 Paige, 299; Thompson v. Emmert, 4 McLean, 96; Lincoln v.

Tower, 2 McLean, 473; Melhop v. Doane, 31 Iowa, 397; 7 Am. Rep. 147; Ward v. McKenzie, 33 Tex. 297; 7 Am. Rep. 261; Sevier v. Roddie, 51 Mo. 580; Iles v. Elledge, 18 Kan. 296; *ante*, sec. 120 a.

<sup>4</sup> Pickett v. Ferguson, 45 Ark. 177; 55 Am. Rep. 545; Rogers v. Burns, 27 Pa. St. 525; Steel v. Smith, 7 Watts & S. 451; D'Arcy v. Ketchum, 11 How. 165; Phelps v. Brewer, 9 Cush. 390; 57 Am. Dec. 56; Newlon v. Heaton, 42 Iowa, 593; Bowler v. Huston, 30 Gratt. 266; 32 Am. Rep. 673.

"Personal judgments thus rendered have no operation out of the limits of the state where rendered. Their effects are merely local. Out of the state they are nullities, not binding upon the non-resident defendant, nor establishing any claim against him."<sup>1</sup> In Oregon, such a judgment seems to be regarded as *prima facie* evidence against the defendants who were not served with process.<sup>2</sup> The case of *Hall v. Lanning*, 91 U. S. 160, was one in which a recovery was sought upon a judgment rendered in the state of New York against the plaintiffs in error. One of them, Lybrand, pleaded, questioning the jurisdiction over his person of the court which pronounced the judgment. This judgment was recovered against Lybrand and another, as partners, and the record showed that both partners appeared by attorney and answered the complaint. To avoid the effect of this record, Lybrand offered to prove that he was not a resident or citizen of New York; that he had not been within that state since a period long anterior to the commencement of the action, and that he had never been summoned in the action, nor had any notice thereof, and that he had not appeared in person, nor authorized any one to appear therein for him, nor to employ any attorney to so appear; that he was a partner of his co-defendant Hall at the time the transaction occurred upon which the suit in New York was brought, but that such partnership had been dissolved, and due notice thereof published six months prior to the commencement of such suit. The evidence was overruled on objection of the plaintiffs below. The supreme court held that the partnership having been dissolved, one of the late partners had no power to enter an appearance for the other, nor to authorize it to be entered, and that it was very doubtful whether such an authority existed even during the continuance of the firm, and therefore that the court below erred in exclud-

<sup>1</sup> *Public Works v. Columbia College*, 17 Wall. 527; *ante*, sec. 120 a.

<sup>2</sup> *Swift v. Stark*, 2 Or. 97; 88 Am. Dec. 463.

ing the evidence offered. In reaching this conclusion, the court chiefly relied upon the rule (which it treated as unquestionable) "that a member of a partnership firm residing in one state cannot be rendered personally liable in a suit brought in another state against him and his copartners, although the latter be duly served with process, and although the law of the state where the suit is brought authorizes judgment to be rendered against him."

§ 575. **Same Effect as at Home.**—Except in regard to the allowance and effect of jurisdictional inquiries, the character of a judgment of a sister state is substantially that of a domestic judgment.<sup>1</sup> Its effect, however, is often different from that of a similar record in the state in which it is sought to be enforced, because it is governed by the laws of the locality where it was created. The first question to be determined in regard to a judgment of another state, after jurisdictional inquiries have been satisfactorily answered, is, What is its effect in the state whence it was taken?<sup>2</sup> The effect which it has there is precisely the effect which must be accorded to it in every other state.<sup>3</sup> It must not be given any greater effect than it has in the state wherein it was rendered.<sup>4</sup> If the judgment appear on its face to be harsh and erroneous, it must be received and enforced, irrespective of its harshness.<sup>5</sup> The pleas which might be made to it at home, and those only, can be made to it in any other part of the

<sup>1</sup> *Rogers v. Odell*, 39 N. H. 452; *Christmas v. Russell*, 5 Wall. 290; *Moulin v. Insurance Co.*, 24 N. J. L. 222; *Armory v. Armory*, 3 Biss. 266; *Campbell v. Home Ins. Co.*, 1 S. C. 158; *Barney v. White*, 46 Mo. 137; *Zimmerman v. Helser*, 32 Md. 274; *Chew v. Brumagim*, 21 N. J. Eq. 520; *Galick v. Loder*, 13 N. J. L. 68; 23 Am. Dec. 711; *Guthrie v. Lowry*, 84 Pa. St. 533; *Black v. Smith*, 13 W. Va. 780; *Eaton v. Hasty*, 6 Neb. 419; 29 Am. Rep. 365.

<sup>2</sup> *Taylor & Co. v. Runyan*, 3 Clarke,

474; *Snydam v. Barber*, 18 N. Y. 468; 75 Am. Dec. 254; *Green v. Sarmiento*, 3 Wash. C. C. 17.

<sup>3</sup> *McLaren v. Kehler*, 23 La. Ann. 80; 8 Am. Rep. 592; *Simmons v. Clark*, 56 Ill. 96; *French v. Pease*, 10 Kan. 51; *Hanley v. Donogue*, 116 U. S. 1.

<sup>4</sup> *Wood v. Watkinson*, 17 Conn. 500; 44 Am. Dec. 562; *Van Cleaf v. Burns*, 110 N. Y. 549; 16 Am. St. Rep. 782; *Taylor v. Barron*, 30 N. H. 78; 64 Am. Dec. 231; *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 254.

<sup>5</sup> *Rankin v. Barnes*, 5 Bush, 20.

Union.<sup>1</sup> If, notwithstanding the pendency of an appeal or writ of error, an action may be prosecuted upon it at home, a like action is sustainable in another state.<sup>2</sup> If the common-law distinctions in forms of actions have been abolished in the state where the judgment is rendered, then it must not be treated in other states according to the rules growing out of those distinctions.<sup>3</sup> If valid under the law of its creation, it must be treated as valid in states under whose laws it would, if a domestic judgment, be invalid.<sup>4</sup> An interlocutory decree, not being conclusive at home, is not conclusive in another state.<sup>5</sup> Whatever effect a judgment has as an estoppel or a merger in the state in which it was entered, it has in every other state.<sup>6</sup> If a person having a demand against another presents it as a cause of action or as a counterclaim, and the statute of limitations is successfully interposed against it, he cannot assert it in another state, though it is not there barred by the statute. The judgment, being conclusive against him where entered, is equally so in every other state.<sup>7</sup> If a question arises and is determined in a proceeding to settle or distribute the estate of a decedent, the decision is conclusive in other states. Hence the

<sup>1</sup> *Cook v. Thornhill*, 13 Tex. 293; 65 Am. Dec. 63; *Brundell v. Vaux*, 2 Dall. 302; *Mills v. Duryee*, 7 Cranch, 481. See, however, *Judkins v. U. M. Fire Ins. Co.*, 37 N. H. 470.

<sup>2</sup> *Taylor v. Shew*, 39 Cal. 536; 2 Am. Rep. 478; *Clark v. Child*, 136 Mass. 344; *Rogers v. Hatch*, 8 Nev. 35; *Piedmont etc. Co. v. Ray*, 75 Va. 821; *Bank v. Wheeler*, 28 Conn. 433; 73 Am. Dec. 683; *Merchants' Ins. Co. v. De Wolf*, 33 Pa. St. 652. But when judgment is entered in the second action, execution thereon may be stayed until the appeal is determined: *Piedmont etc. Co. v. Ray*, 75 Va. 821.

<sup>3</sup> *Griffin v. Eaton*, 27 Ill. 379; 81 Am. Dec. 233.

<sup>4</sup> *Clemmer v. Cooper*, 24 Iowa, 185; 95 Am. Dec. 720; *Ritter v. Hoffman*, 35 Kan. 215.

<sup>5</sup> *Baugh v. Baugh*, 4 Bibb, 556; *Brinkley v. Brinkley*, 50 N. Y. 184; 10 Am. Rep. 480.

<sup>6</sup> *Memphis R. R. Co. v. Grayson*, 88 Ala. 572; 16 Am. St. Rep. 69; *Barnes v. Gibbs*, 31 N. J. L. 317; 86 Am. Dec. 210; *West Feliciana R. R. Co. v. Thornton*, 12 La. Ann. 736; 68 Am. Dec. 778; *Whiting v. Burger*, 78 Me. 287; *Folsom v. Winch*, 63 Iowa, 477; *Powell v. Davis*, 60 Ga. 70; *Wilbur v. Abbot*, 60 N. H. 40; *Cannon v. Brame*, 45 Ala. 262; *Blodget v. Jordan*, 6 Vt. 580; *Spencer v. Brockway*, 1 Ohio, 239; 13 Am. Dec. 615; *Cherry v. Speight*, 28 Tex. 503; *Wernwag v. Pawling*, 5 Gill & J. 500; 25 Am. Dec. 317; *R. R. Co. v. Wynne*, 14 Ind. 386; *Baker v. Rand*, 13 Barb. 152; *Taylor v. Dryden*, 8 Johns. 173; 2 Am. Lead. Cas., 5th ed., 619.

<sup>7</sup> *Sweet v. Brackley*, 53 Me. 346; *Wernse v. McPike*, 100 Mo. 476; *Weeks v. Harriman*, 65 N. H. 91; 23 Am. St. Rep. 21.

admission of a will to probate in a court of the state of the decedent's domicile is conclusive evidence in other states of all the facts there necessary to warrant such admission.<sup>1</sup> If, however, the court admitting the will to probate has no jurisdiction of wills concerning real estate, then its admission to probate does not affect the title to real estate, either in the state of the probate or elsewhere;<sup>2</sup> and from the general rule that each state has exclusive jurisdiction over the realty within its limits, it has the exclusive power to construe wills, so far as they affect such realty,<sup>3</sup> and to determine whether they have been executed in conformity to the laws of the state in which the realty is situate.<sup>4</sup> A judgment against a corporation, rendered in the state of its residence, is entitled to full faith and credit in another state, even against its non-resident stockholders who were not parties to the action.<sup>5</sup> A decree in a court of chancery in one state enjoining a judgment for fraud is conclusive in an action on the judgment in another state, though it has no extraterritorial force as an injunction.<sup>6</sup> In some respects it is obvious that the judgment of a court of another state cannot have the same effect as a domestic judgment. Writs of execution cannot issue thereon, because the domestic courts have no authority to issue such writs in aid of the jurisdiction of foreign tribunals, nor can these latter tribunals issue writs which may be enforced in other states.

<sup>1</sup> *Whicker v. Hume*, 7 H. L. Cas. 124; 4 Jur., N. S., 933; 28 L. J. Ch. 396; *Dalrymple v. Gamble*, 68 Md. 523; *Drake v. Curtis*, 88 Mo. 644; *Loring v. Arnold*, 15 R. I. 428; *Thomas v. Morrisett*, 76 Ga. 384; *Peterson v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298; *Crippen v. Dexter*, 13 Gray, 330; *Enohin v. Wylie*, 10 H. L. Cas. 1; 8 Jur., N. S., 897; 31 L. J. Ch. 402; 10 Week. Rep. 467; 6 L. T., N. S., 263; *Goodman v. Winter*, 64 Ala. 426; 38 Am. Rep. 13; *Gaines v. New Orleans*, 5 Wall. 703; *Brock v. Frank*, 51 Ala. 90; *Melvin v. Lyons*, 10 Smedes & M. 78; *Schultz v. Schultz*, 10 Gratt. 358; 60 Am. Dec. 335.

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<sup>2</sup> *Tompkins v. Tompkins*, 1 Story, 547; *Whicker v. Hume*, 7 H. L. Cas. 124; 4 Jur., N. S., 933; 28 L. J. Ch. 396; *Tygart v. Peeples*, 9 Rich. Eq. 46.

<sup>3</sup> *McCartney v. Osborn*, 121 Ill. 408; *Sale v. Saunders*, 24 Miss. 24; 57 Am. Dec. 157.

<sup>4</sup> *Hawley v. James*, 7 Paige, 213; 32 Am. Dec. 623; *Wynne v. Wynne*, 23 Miss. 251; 57 Am. Dec. 139; *Mahorner v. Hooe*, 9 Smedes & M. 247; 48 Am. Dec. 706; *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41.

<sup>5</sup> *Glenn v. Williams*, 60 Md. 93.

<sup>6</sup> *Dobson v. Pearce*, 12 N. Y. 156; 62 Am. Dec. 152.



From this inability to obtain satisfaction thereof by execution, it is clear that a judgment entered in another state is not a lien on property in this state, and for the purpose of sharing in the assets of the defendant, ranks no higher than a simple contract debt.<sup>1</sup> It is well settled that one state cannot be required to aid in the execution of the penal laws of another, and hence that there are many penalties enforceable by action in the state under whose laws they are imposed which are not enforceable elsewhere. When, however, an action has been prosecuted to judgment, it has been thought that the cause of action so merged therein that no further inquiry would be made respecting its nature, and therefore that an action on a judgment of another state could not be defeated by showing that it was founded upon a penalty imposed for a violation of the penal laws or police regulations of such state.<sup>2</sup> This view is not now maintainable. On the other hand, it is finally settled that the judgment does not preclude an inquiry respecting "the essential nature and real foundation of a cause of action," for the purpose of "ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."<sup>3</sup>

§ 576. **Defenses.**—All defenses which are admissible against a judgment where it was pronounced are equally admissible in actions upon it in another state. Want of jurisdiction, as we have seen, is generally recognized as a good defense.<sup>4</sup> With this exception, no defense which would not be received in the forum whence the judgment was taken will be allowed against it elsewhere, unless it be fraud in its procurement, or that it is founded upon a penalty imposed by the laws of another state, which the

<sup>1</sup> *McElmoyle v. Cohen*, 13 Pet. 312; *Wisconsin v. Pelican Ins. Co.*, 127 Ind. 292.

<sup>2</sup> *Spencer v. Brockway*, 1 Ohio, 229; 13 Am. Dec. 615; *State v. Helmer*, 21 Iowa, 370; *Healy v. Root*, 11 Pick. 389.

<sup>3</sup> *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 292; *Attrill v. Huntington*, 70 Md. 191; 14 Am. St. Rep. 344.

<sup>4</sup> *Chunn v. Gray*, 51 Tex. 112; *Drake v. Granger*, 22 Fla. 348.

courts of the state where suit is brought are under no obligation to enforce, or is barred by the statute of limitations.

Fraud in the procurement of an unconscionable judgment or decree entitles the defendant to relief therefrom in the state in which it was entered; and as no judgment or decree is entitled to any greater faith or credit in another state than in the state of its rendition, it must be that if it was procured by fraud, its assertion in another state can be prevented by some appropriate proceeding. It may be that in the state of its origin relief from a domestic judgment on account of fraud can be procured only by a suit in equity, while in the state in which the action is brought the same court may exercise jurisdiction both in law and in equity, and may therefore entertain as an equitable defense any cause sufficient to warrant the granting of relief in an independent suit; or, on the other hand, a judgment entered in a state where equitable defenses may be asserted in actions at law may be the basis of an action in a state where the matters constituting such a defense are ordinarily available only in suits in equity. In either event, if the judgment was procured under circumstances requiring its enforcement to be enjoined in equity, the question will arise whether these circumstances may be interposed as a defense to an action on the judgment in another state. Notwithstanding expressions to the contrary, we apprehend that in bringing an action in another state the judgment creditor must submit to the law of the forum, and must meet the charge of fraud in its procurement when presented in any form in which fraud might be urged in an action on a domestic judgment. If, in the state in which the action is pending, fraud can be pleaded to an action on a domestic judgment, it is equally available and equally efficient in actions on judgments of other states.<sup>1</sup> But if, to avoid a domestic

<sup>1</sup> 2 Am. Lead. Cas., 5th ed., 658; *v. Headley*, 22 N. J. Eq. 115; *Davis v. Rogers v. Gwinn*, 21 Iowa, 58; *Davis Smith*, 5 Ga. 274; 48 Am. Dec. 279;

judgment for fraud, proceedings must be instituted in equity, then like proceedings, and those only, must be resorted to as against a judgment of another state.<sup>1</sup> It is true that two of the decisions of the supreme court of the United States contain the general statement that the plea of fraud is not available as an answer to an action on a judgment.<sup>2</sup> We apprehend, however, that these decisions are inapplicable in those states in which the distinction between law and equity is attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law. Circumstances may exist in which it would be competent to a court of equity, on the ground of fraud, to enjoin a party from enforcing a judgment recovered in another state.<sup>3</sup> Certainly the defendant ought, when sued in a state acting under the reformed code of procedure, to be permitted to assert his equitable defense in that action, instead of being required to resort to a separate and independent suit. Fraud anterior to the entry of the judgment, which is not admissible as a ground for relief in the state wherein a judgment is rendered, is equally inadmissible elsewhere. Hence relief cannot be had in another state on the ground of perjury and conspiracy in prosecuting the action in which the judgment was given,<sup>4</sup> nor because of any fraud which might have been urged against the maintenance of the former action.<sup>5</sup> An action on a judgment confessed in another state by a power of attorney can be defeated by showing that the defendant neither executed the power of attorney nor had any notice

*Bimeler v. Dawson*, 4 Scam. 536; 39 Am. Dec. 430; *White v. Trotter*, 14 Smedes & M. 30; 53 Am. Dec. 112; *Eaton v. Hasty*, 6 Neb. 419; 29 Am. Rep. 635; *Welch v. Sykes*, 3 Gilman. 197; 44 Am. Dec. 689; *Keeler v. Elston*, 22 Neb. 310.

<sup>1</sup> 2 Am. Lead. Cas., 5th ed., 58, 59.

<sup>2</sup> *Christmas v. Russell*, 5 Wall. 290; *Maxwell v. Stewart*, 22 Wall. 77.

<sup>3</sup> *Black v. Smith*, 13 W. Va. 794; *Pearce v. Olney*, 20 Conn. 544; *Eaton*

*v. Hasty*, 6 Neb. 419; 29 Am. Rep. 365; *Ward v. Quinlivan*, 57 Mo. 425; *Engel v. Scheuerman*, 40 Ga. 206; 2 Am. Rep. 573.

<sup>4</sup> *Metcalf v. Gilmore*, 59 N. H. 417; 47 Am. Rep. 217; *McDonald v. Drew*, 64 N. H. 547; *Engstrom v. Sherburne*, 137 Mass. 153; *Riley v. Murray*, 8 Ind. 354.

<sup>5</sup> *Weir v. Vail*, 65 Cal. 466; *Packer v. Thompson*, 25 Neb. 638; *Jeter v. Fellowes*, 32 Pa. St. 465.

of the pendency of the suit.<sup>1</sup> To an action in Tennessee on a judgment rendered in Kentucky the defendant pleaded that plaintiff took advantage of political prejudices existing when the suit was commenced to combine with citizens of the latter state to prevent his making any defense, and that therefore defendant permitted default to be taken because he could not appear without endangering his life. The plea was decided to be sufficient.<sup>2</sup> Nothing which could have been pleaded as a defense in the original action can be pleaded against the judgment.<sup>3</sup> Errors and irregularities in the proceedings in the original suit do not in any respect impair the effect of the judgment, unless taken advantage of by an appeal or some other appropriate correctory proceeding.<sup>4</sup> The following plea, involving a denial of the jurisdiction of the court, was said to exclude every hypothesis in favor of the judgment: "And the said defendant says that at the time when said proceedings were commenced, as set forth in said declaration, and from that time up to and at the time when said supposed judgment was rendered as aforesaid, he, the said defendant, was a citizen of the state of Arkansas, and resident therein, and was not served with process, and had no notice whatever of the pendency of said action, and that he never appeared thereto in person nor by attorney, and this he is ready to verify."<sup>5</sup>

Any matter occurring after the entry of a judgment discharging or releasing the defendant therefrom may be pleaded as a defense to an action thereon in another state.<sup>6</sup> Hence his subsequent discharge in bankruptcy constitutes

<sup>1</sup> *Wilson v. Bank of Mount Pleasant*, 6 Leigh, 570.

<sup>2</sup> *Coffee v. Neely*, 2 Heisk. 304.

<sup>3</sup> *Norwood v. Cobb*, 20 Tex. 588; *Goodrich v. Jenkins*, 6 Ohio, 43; *Har-ryman v. Roberts*, 52 Md. 64; *Drake v. Granger*, 22 Fla. 348; *Hall v. Mackay*, 78 Tex. 248; *West eto. R'y Co. v. Thornton*, 13 La. Ann. 736; 48 Am. Dec. 778; *Sweet v. Brackley*, 53 Me. 348; *Green v. Sanborn*, 150 Mass. 454; *Snow v. Mitchell*, 37 Kan. 636;

*Powell v. Davis*, 60 Ga. 70; *Greene v. Republic F. Ins. Co.*, 84 N. Y. 572.

<sup>4</sup> *Struble v. Malone*, 3 Clarke, 586; *Conway v. Ellison*, 14 Ark. 360; *Olds v. Glaze*, 7 Iowa, 86; *Crawford v. Ex'rs of Simonton*, 7 Port. 110; *Kinnier v. Kinnier*, 45 N. Y. 535; 6 Am. Rep. 132.

<sup>5</sup> *Barkman v. Hopkins*, 11 Ark. 161.

<sup>6</sup> *Haggerty v. Amory*, 7 Allen, 458; *Revere C. Co. v. Dimock*, 90 N. Y. 33; *Anderson v. Clark*, 70 Ga. 362.

a defense, if granted by a court having power to release him from the judgment. Though the statute of limitations of the state in which the action is brought may have run against the original cause of action, it cannot be successfully urged against the judgment in another state. There are states whose statutes of limitations declare that when a cause of action arose in another state, whether such cause shall be deemed barred or not, shall be determined by the statute of that state, and where this is the case an action on a judgment may be maintained until barred by the statute of the state of its origin.<sup>1</sup> But in the absence of any statutory rule to the contrary, the statute of limitations of the state in which the remedy is sought must be applied to actions upon judgments;<sup>2</sup> and therefore an action may sometimes be sustained upon a judgment, though barred by the statute of the state in which it was rendered;<sup>3</sup> and on the other hand, the statute of the state in which an action on a judgment is brought may sometimes constitute a sufficient defense, though the time in which plaintiff is allowed to sue thereon in the state in which it was recovered has not terminated;<sup>4</sup> and if the state in which the action is brought has no statute of limitations applicable to judgments recovered in other states, such action may be maintained, irrespective of the lapse of time.<sup>5</sup> Judgments are entitled to protection as contracts. Hence the statute of limitations of the state in which an action on a judgment entered in another state is brought will not be permitted to defeat the action, if the application of the statute would not leave the plaintiff a reasonable time in which to pursue his remedy.<sup>6</sup>

§ 577. *Of Courts not of Record.* — The attestation prescribed by the act of 1790 and by the present Revised

<sup>1</sup> *Watkins v. Wortman*, 19 W. Va. 78.

<sup>2</sup> *Miller v. Brenham*, 68 N. Y. 83.

<sup>3</sup> *Stewart v. Spaulding*, 72 Cal. 264; *Miller v. Brenham*, 68 N. Y. 83; *Hendricks v. Comstock*, 12 Ind. 238; 74 Am. Dec. 205.

<sup>4</sup> *Kay v. Walter*, 28 Kan. 111.

<sup>5</sup> *Napier v. Gidiere*, 1 Speers Eq. 215; 40 Am. Dec. 613.

<sup>6</sup> *Scarborough v. Dugan*, 10 Cal. 305; *Price v. Hopkin*, 13 Mich. 318; *Osborn v. Jaines*, 17 Wis. 573.

Statutes of the United States must be made by the clerk, with the seal of the court, if there be one, annexed, and by the certificate of the chief justice or presiding magistrate, as the case may be. The judgments of justices of the peace and of other courts having neither a seal nor a clerk do not admit of authentication in the mode prescribed by these statutes, and hence have been held to be without their protection, and not entitled to any greater effect than foreign judgments.<sup>1</sup> On the other hand, it is insisted that the constitution of the United States requires that "full faith and credit shall be given in each state to the public acts, records, and *judicial proceedings* of every other state"; that this constitutional provision is self-executing; and that the failure of Congress to provide a mode of authenticating the judgments of courts not of record does not deprive them of their character of "judicial proceedings," nor warrant the withholding from them in any other state of the full faith and credit attaching to them in the state wherein they were rendered.<sup>2</sup> A third class of decisions, without determining whether the constitution is self-executing or not, accords to judgments of courts not of record, if their jurisdiction is established or conceded, and proof is made of them in the manner appropriate to foreign judgments, or in such other mode as may be sanctioned by the laws of the state in which they are offered in evidence, the same conclusiveness as adjudications as though they were domestic judgments, though the plea properly filed in the action may be styled *nil debet* or *non assumpsit*.<sup>3</sup> The judgment

<sup>1</sup> *Graham v. Grigg*, 3 Harr. (Del.) 408; *Taylor v. Barron*, 30 N. H. 78; *Warren v. Flagg*, 2 Fick. 448; *McElfattrick v. Taft*, 10 Bush, 160; *Wood v. Wood*, 78 Ky. 624. In New Hampshire it is said that a judgment of a justice of the peace of another state must be considered "as leaving the whole merits of the case open for discussion and examination, and that the defendant is not estopped from setting up a payment made before the judg-

ment was rendered: *Robinson v. Prescott*, 4 N. H. 450.

<sup>2</sup> *Stockwell v. Coleman*, 10 Ohio St. 83; *Silver Lake Bank v. Harding*, 5 Ohio, 546; *Carpenter v. Pier*, 30 Vt. 81; 73 Am. Dec. 288; *Starkweather v. Loomis*, 2 Vt. 573; *Kean v. Rice*, 12 Serg. & R. 203; *Lawrence v. Gaultney, Cheves*, 7.

<sup>3</sup> *Glass v. Blackwell*, 48 Ark. 50; *Danforth v. Thompson*, 34 Iowa, 243.

of a justice of the peace of another state must "be proved by the oath of witnesses who have compared the copy produced in evidence" with the original.<sup>1</sup> The question of what constitutes a sufficient authentication of judicial proceedings, under the law of Congress, has been considered in the chapter on Judgments as Evidence.

§ 578. **Courts of the United States.**—The same rule applies to judgments rendered in the United States courts, when relied upon in another state, as that which would in like circumstances be applied to the judgment of any court of record of another state.<sup>2</sup> "The judgments and decrees of the circuit court of the United States sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority"; and whether they have been accorded such effect is a question the determination of which is within the jurisdiction of the supreme court of the United States.<sup>3</sup> A judgment of a circuit court of the United States may therefore be the basis, in the courts of the state in which it was entered, of a creditor's bill, or of any remedy given by statute to aid the enforcement of the judgments of the state courts.<sup>4</sup>

§ 579. **Decrees of Divorce in States to Which Both Parties have Removed.**—When the spouses remove from the state in which they were married, the marriage relation becomes subject to the laws of the state of which they become *bona fide* residents; and a divorce granted there, though for some cause not recognized as sufficient where the marriage was celebrated, is binding on both parties in every other state.<sup>5</sup>

<sup>1</sup> Am. Lead. Cas., 5th ed., 660.

<sup>2</sup> Niblett v. Scott, 4 La. Ann. 246; Barney v. Patterson, 6 Har. & J. 182; Thomson v. Lee County, 22 Iowa, 206; Dudley v. Lindsey, 9 B. Mon. 486; 50 Am. Dec. 522; McCauley v. Hargroves, 48 Ga. 50; 15 Am. Rep. 660; Pasteur v. Lewis, 39 La. Ann. 5; Dorsey v.

Maury, 10 Smedes & M. 298; Ballin v. Loeb, 78 Wis. 404.

<sup>3</sup> Crescent L. S. Co. v. Butchers' Union, 120 U. S. 147.

<sup>4</sup> Ballin v. Loeb, 78 Wis. 404.

<sup>5</sup> Barber v. Root, 10 Mass. 265; Pawling v. Bird's Ex'rs, 13 Johns. 192; Vischer v. Vischer, 12 Barb. 640;

§ 580. **Divorce in Another State by Parties Going there to Procure It.** — No doubt is entertained in regard to the conclusive effect of a divorce obtained in a state to which the parties have removed with the intention of making their domicile there. But many instances occur in which the removal is apparently for the purpose of procuring a divorce for some act not regarded as a sufficient cause at the place of its commission, or in order to avoid such a defense as would probably be made if the action were prosecuted near the domicile of the defendant. No doubt most of the state courts have deemed a divorce so procured the consummation of a fraud upon the laws and courts of the state where the cause of divorce was alleged to have occurred, as well as upon the defendant, and have refused to pay it any respect whatever.<sup>1</sup> If it appears that resort was had to the courts of a state in which neither party had a domicile, the judgment will be treated in other states as void for want of jurisdiction over the subject-matter.<sup>2</sup>

Sometimes the position has been taken that only the courts of the state having jurisdiction over the *domicile* of the *parties* at the commission of the act can grant a divorce, because they alone have jurisdiction over the *subject-matter*, and that if the alleged cause is not a ground for divorce where it occurred, and where the parties were then domiciled, neither can by going into another state obtain a valid divorce therefor. Thus one of the judges,

Harding v. Allen, 9 Greenl. 148; 23 Am. Dec. 549; Fellows v. Fellows, 8 N. H. 160; Tolen v. Tolen, 2 Blackf. 407; 21 Am. Dec. 742, and note; State v. Armington, 25 Minn. 29; Hunt v. Hunt, 72 N. H. 217; 28 Am. Rep. 129; Hood v. Hood, 11 Allen, 196; 87 Am. Dec. 709; Shaw v. Shaw, 98 Mass. 158; Payson v. Payson, 34 N. H. 518; Cheely v. Clayton, 110 U. S. 705.

<sup>1</sup> Hood v. State, 56 Ind. 263; 26 Am. Rep. 21; 5 Cent. L. J. 35; Newcomb v. Newcomb, 13 Bush, 544; 26 Am. Rep. 222; People v. Baker, 76 N. Y. 78; 32 Am. Rep. 274; 10 Cent.

L. J. 171; State v. Fleak, 54 Iowa, 429; Burren v. Shannon, 99 Mass. 200; 96 Am. Dec. 733; Chaney v. Bryan, 15 Lea, 589; People v. Dawell, 25 Mich. 247; 12 Am. Rep. 260.

<sup>2</sup> State v. Armington, 25 Minn. 29; Smith v. Smith, 19 Neb. 706; Van Fossen v. State, 37 Ohio St. 317; 44 Am. Rep. 507; Gregory v. Gregory, 76 Me. 535; 57 Am. Rep. 792; Reed v. Reed, 52 Mich. 117; 50 Am. Rep. 247; Gettys v. Gettys, 3 Lea, 260; 31 Am. Rep. 637; Neff v. Beauchamp, 74 Iowa, 92; Leith v. Leith, 39 N. H. 20.



delivering an opinion of a supreme court of New York, said: "I cannot agree to the proposition that a party domiciled in this state, desiring a divorce for a cause occurring here, for which such a divorce will not be granted by the laws of this state, can remove to another state, where the act complained of is legal cause for such divorce, and then, upon the ground of such act occurring here before his becoming domiciled there, obtain the decree, and then return to this state and use it here for any purpose."<sup>1</sup> If a decree of divorce rendered in another state contains the recital that the parties resided in such state, this decree may be contradicted, and its effect entirely destroyed by showing that they had their domicile in a different state; and a party procuring such decree may be convicted of bigamy in the state of his actual domicile, if he contracts another marriage there.<sup>2</sup> The place in which the marriage was celebrated is not necessarily important in determining the jurisdiction in an action for divorce; in truth, the courts of the state in which such celebration occurred may become divested of their jurisdiction to annul the marriage. Thus if an alleged cause of divorce arose in a state where the spouses resided, the wife cannot return to the state in which she was married, and there by constructive service of process obtain a divorce from her husband, who remains domiciled in the state in which the cause of divorce arose.<sup>3</sup> But it does not, according to some of the authorities, appear to be essential that the action be brought in the state where the cause of action arose, if thereafter the spouses removed to another state in good faith, and not merely to escape the laws and courts of their domicile.<sup>4</sup> "When a person domiciled in this state goes, in evasion

<sup>1</sup> *Holmes v. Holmes*, 4 Lana. 388. See, to same effect, *Inhabitants of Hanover v. Turner*, 14 Mass. 227; 7 Am. Dec. 203, and note; *Greenlaw v. Greenlaw*, 12 N. H. 200; *Lyon v. Lyon*, 2 Gray, 369; *Colvin v. Reed*, 55 Pa. St. 375.

<sup>2</sup> *People v. Dawell*, 25 Mich. 247; 12 Am. Rep. 260.

<sup>3</sup> *Harteau v. Harteau*, 14 Pick. 181; 25 Am. Dec. 372; *Proper v. Warner*, 47 Vt. 667; 19 Am. Rep. 132.

<sup>4</sup> *Harding v. Alden*, 9 Greenl. 140; 23 Am. Dec. 549.

and fraud of the law of his domicile, into another state in order to obtain a divorce there for a cause which occurred here while the parties resided here, or for a cause which would not authorize a divorce by our law, it is within the power of the state by its courts or its legislature to declare or enact that a divorce so obtained before acquiring a domicile in the other state is or shall be of no force or effect in this state. . . . It is competent to show that a decree of divorce granted by a court of another state, although appearing on its face to be valid, is in fact void, because the libelant fraudulently, and in evasion of the law of his own domicile, procured that court to exercise jurisdiction over the case.”<sup>1</sup>

§ 581. **Cases where Divorces may be Granted against Non-residents.**— We have already seen that neither the section of the constitution of the United States in regard to judicial proceedings of other states, nor the act of Congress on the same subject, extends the authority of the courts of one state so as to authorize them to take jurisdiction over the citizens of other states. Some modification of this construction seems unavoidable in proceedings for divorce. “Suppose a husband commits adultery and then purchases a house, and actually takes up his domicile in another state, but before his wife has joined him, she is apprised of the fact, and immediately files a libel for divorce, and obtains an order to protect her from the power of her husband, as by law she may. He is an inhabitant of another state, and can in no sense be said to live in any county in this state, and yet it would be difficult to say that she is not entitled to have a divorce here. Supposing, instead of the last case, he has actually purchased a house, and changed his domicile to another state, and there commits adultery, and the wife, not having joined him, and not having left her residence in this state, becomes acquainted with the fact, and libels, and

<sup>1</sup> Sewall v. Sewall, 122 Mass. 156; 23 Am. Rep. 299.

obtains a similar order, could she not maintain it? Yet in the latter case, at the time of the act done, and in the other, at the time of the suit instituted, the respondent, one of the parties, did not live in this commonwealth. This suggests another course of inquiry; that is, how far the maxim is applicable to this case, that the domicile of the wife follows that of the husband. Can this maxim be true in its application to this subject, where the wife claims to act, and by law to a certain extent and in certain cases is allowed to act, adversely to her husband? It would oust the court of its jurisdiction in all cases where the husband should change his domicile to another state before the suit is instituted. It is in the power of a husband to change and fix his domicile at will. If the maxim could apply, a man might go from this county to Providence, take a house, live in open adultery, abandoning his wife altogether, and yet she could not libel in this state, where, till such a change of domicile, they had always lived. It is probably a just view to consider that the maxim is founded upon the theoretic identity of person and of interest between husband and wife as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen, and secure their interests in this relation as it ordinarily exists where union and harmony prevail. But the law will recognize a wife as having a separate existence, and separate interests and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home, bed and board being put, a part for the whole, as expressive of the idea of home."<sup>1</sup> The courts in Massachusetts recently took jurisdiction of a case which was a little different from either of the hypothetical cases stated in the foregoing opinion of Chief Justice Shaw. A husband and wife left

<sup>1</sup> Chief Justice Shaw, in *Hartean v. Hartean*, 14 Pick. 181; 25 Am. Dec. 372.

Massachusetts, intending to remove to Colorado, and to have their permanent domicile there. They stopped temporarily at Philadelphia, when on their way to Colorado. The husband there committed acts of cruelty, on account of which the wife returned to her former home and applied for a divorce. The husband did not return to Massachusetts, but the courts of that state nevertheless exercised jurisdiction over him for the purpose of giving the wife the relief sought for his violation of the marriage contract.<sup>1</sup>

§ 582. **Domicile of Wife.**—That the domicile of the husband is in law the domicile of his wife is not true, where, on account of a final separation, they have taken up their residences in different states,<sup>2</sup> nor where the husband is guilty of such a violation of his marital engagements as entitles the wife to a partial or entire dissolution of the marriage relation.<sup>3</sup> “If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile, and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicile, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, though she never in fact resided in that state.”<sup>4</sup>

§ 583. **Constructive Service Rejected.**—When, from any cause, the domicile of the parties is no longer in contemplation of the law identical, but, on the contrary, has become susceptible of separation, and the parties in fact reside in different states, it is evident that neither party can obtain the redress authorized by law, unless the state courts can render a decree which will be binding on the non-resident defendant. The courts of the state

<sup>1</sup> Shaw v. Shaw, 98 Mass. 158.

<sup>2</sup> Jenness v. Jenness, 24 Ind. 355; 87 Am. Dec. 335.

<sup>3</sup> Ditson v. Ditson, 4 R. I. 87; Harding v. Alden, 9 Greenl. 140; 23 Am.

Dec. 549; Maguire v. Maguire, 7 Dana, 181; Hollister v. Hollister, 6 Pa. St. 449; Hunt v. Hunt, 72 N. Y. 217; 23 Am. Rep. 129.

<sup>4</sup> Cheely v. Clayton, 110 U. S. 705.

of New York deny that if a husband and wife have their domicile in that state either of them can go into another state and obtain a divorce, without the appearance of the defendant, which can be of any validity in New York.<sup>1</sup> In Pennsylvania it is held that the injured spouse must seek redress in the state where the injury was committed, unless the defendant removes from the common domicile.<sup>2</sup>

§ 584. **Constructive Service Effective.**—But if, from the destruction of their common domicile, the injured party has been authorized to acquire, and has acquired, a domicile in another state, in which the dissolution of the marriage is sought, then there is an absolute necessity for some means by which the courts may compel the non-resident defendant to submit his claims to a continuance of the marriage relation to their jurisdiction. The means usually provided by statute consists of some constructive service of process, as by the publication of the summons for a specified time in some public journal. Judgments procured in any state by constructive service of process upon non-residents are, as we have already seen, of no extraterritorial force in imposing obligations *in personam*. But a sentence of divorce has, or may have, a dual nature. It is a decree *in rem*, so far as it fixes the *status* of the parties by dissolving their marital obligations. But so far as it disposes of any other matter than the marriage relation, it is *in personam*. The decisions already cited from the New York reports refuse to recognize a decree of divorce rendered in another state upon constructive service of summons against a non-resident. But in this respect the New York cases are not sustained by the adjudications made in other states.<sup>3</sup>

<sup>1</sup> *Vischer v. Vischer*, 12 Barb. 640; *Holmes v. Holmes*, 4 Lans. 388; *Hoffman v. Hoffman*, 46 N. Y. 30; 7 Am. Rep. 299; *Kerr v. Kerr*, 41 N. Y. 272; *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447; *People v. Baker*, 76 N. Y. 78; 32 Am. Rep. 274; *O'Dea v.*

*O'Dea*, 101 N. Y. 23; *Borden v. Fitch*, 15 Johns. 121; 8 Am. Dec. 225.

<sup>2</sup> *Reel v. Elder*, 62 Pa. St. 308; *Celvin v. Reed*, 55 Pa. St. 375.

<sup>3</sup> *Hull v. Hull*, 2 Strob. Eq. 174; *Manley v. Manley*, 4 Chand. 97; *Hubbell v. Hubbell*, 3 Wis. 662; 62 Am.

§ 585. **Summary of Law of Divorce in Sister States.**—The conclusions which are sustained by a decided majority of the cases are very clearly and correctly stated by Mr. Cooley, in his work on constitutional limitations, in the following language: "We conceive the true rule to be, that the actual *bona fide* residence of either husband or wife within a state will give to that state authority to determine the *status* of such party, and to pass upon any question affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage or of any alleged offense,<sup>1</sup> and that any such court in that state as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that state or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party."<sup>2</sup> The summary of the law just quoted has been confirmed by the supreme court of the United States, so far as it assumes that the petition for divorce may be received and adjudicated upon by the courts of any state in which the petitioner has a *bona fide* domicile, irrespective of the place of the marriage, of the offense, or of the domicile of the defendant.<sup>3</sup> And while the language employed in this same opinion of the

Dec. 702; *Mansfield v. McIntyre*, 10 Ohio, 28; *Ditson v. Ditson*, 4 R. I. 87; *Harrison v. Harrison*, 19 Ala. 499; *Thompson v. State*, 28 Ala. 12; *Harding v. Alden*, 9 Greenl. 146; 23 Am. Dec. 549; *Maguire v. Maguire*, 7 Dana, 181; *Heirs of Holman v. Bank of Norfolk*, 12 Ala. 369; *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146; *Gould v. Crow*, 57 Mo. 200.

<sup>1</sup> *Jones v. Jones*, 67 Miss. 195; 19 Am. St. Rep. 299; *Arrington v. Arrington*, 102 N. C. 491; *Barlen v. Shannon*,

115 Mass. 438; *Cheely v. Clayton*, 110 U. S. 705; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35. But the rule is otherwise in an action to annul and declare void a marriage: *Cumington v. Belchertown*, 149 Mass. 222.

<sup>2</sup> Cooley's *Constitutional Limitations*, 400, 401. See also Wharton on *Conflict of Laws*, secs., 224-239.

<sup>3</sup> *Cheever v. Wilson*, 9 Wall. 108; *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129.

supreme court of the United States affirms, in general terms, that a decree of divorce, valid and effectual by the laws of the state where it was procured, is valid and effectual in all other states, we do not understand that this or any other part of the opinion was designed to uphold a decree obtained by a party who "goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only." There are states, however, which appear to still insist that a citizen who leaves their boundaries and takes up a residence elsewhere, where he sues for a divorce from his spouse, who has remained in the state of their original residence, cannot obtain a judgment which will affect the *status* of the spouse in the state in which she has remained. Her *status*, it is claimed, is a subject over which the courts of her residence retain exclusive jurisdiction.<sup>1</sup> Whether a decree of divorce, rendered in an action in which defendant did not appear and submit to the jurisdiction of the court, can affect his matrimonial *status* in the state of his domicile or not, it cannot otherwise affect him, nor constitute the basis of a personal action against him. Hence he cannot be compelled to pay alimony awarded by it,<sup>2</sup> nor can it determine the right to the custody of minor children not within the state.<sup>3</sup>

§ 586. *Effect as Decree in Rem.* — So far as the decree or judgment of divorce assumes to dispose of questions other than that of the marriage *status* of the parties, it is not a decree *in rem*, and can have no extraterritorial obligation, unless the defendant was within the jurisdiction of the court. If it awards alimony or costs to the complainant, or makes any disposition in regard to the cus-

<sup>1</sup> Doughty v. Doughty, 28 N. J. Eq. 581; Flower v. Flower, 42 N. J. Eq. 152; Cook v. Cook, 56 Wis. 195; 43 Am. Rep. 706; Jones v. Jones, 108 N. Y. 415; 2 Am. St. Rep. 447; Cross v. Cross, 108 N. Y. 628.

<sup>2</sup> Prosser v. Warner, 47 Vt. 667; 19 Am. Rep. 132; Lytle v. Lytle, 48 Ind. 200; Gould v. Crow, 57 Mo. 200.

<sup>3</sup> Kline v. Kline, 57 Iowa, 336; 42 Am. Rep. 47.

tody of the children, such award is of no force beyond the state wherein it was made.<sup>1</sup>

§ 587. In a Recent Case in Massachusetts the entirely novel view was announced that the proceedings of a court of record, when acting upon an application for a divorce, were not supported by the same presumptions which would support the records of the same court when exercising its jurisdiction upon other matters. The court said: "The paper offered as a record was not admissible. There was no proof that the court in California had jurisdiction of the cause and the parties. Although a court of record, its jurisdiction of the subject of divorce is a special authority not recognized by the common law, and its proceedings stand on the same footing with those of courts of limited jurisdiction."<sup>2</sup>

<sup>1</sup> Jackson v. Jackson, 1 Johns. 424; Harr. (Del.) 440; Cooley's Constitutional Limitations, 406.  
Crane v. Meginnis, 1 Gill & J. 463; 19 Am. Dec. 237; Townsend v. Griffin, 4

<sup>2</sup> Com. v. Blood, 97 Mass. 533.



## CHAPTER XXVII.

## FOREIGN JUDGMENTS.

- § 588. Of jurisdictional inquiries.
- § 589. Of jurisdiction over absentees.
- § 590. Of jurisdiction over corporations.
- § 591. Effect of fraud.
- § 592. Distinction between judgments as causes of action, and as pleas in bar.
- § 593. Decree of dismissal.
- § 594. Conclusiveness in England.
- § 595. Founded on mistake of law.
- § 596. Rule of the early American cases.
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- § 598. Foreign decree.
- § 599. Foreign decree of discharge of insolvent.
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- § 601. Of interested court.
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- § 603. Presumed to be based on written complaint.
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- § 604 a. Judgments in District of Columbia.
- § 605. Are not records.
- § 605 a. Foreign probate.
- § 605 b. Foreign bankruptcy.
- § 605 c. Foreign divorce.

§ 588. **Of Jurisdiction.** — The question which first suggests itself in regard to foreign judgments is one which we have had occasion to investigate in reference to every other kind of judgment; viz., Is the jurisdiction of the court an open question? and if so, were the subject-matter of the controversy and the party against whom the judgment has been pronounced within the jurisdiction of the court? In treating of the judgments of other states of the American Union, we have shown that, notwithstanding the provisions of the constitution and of the statutes made in pursuance thereof, a judgment of another state may always be avoided by showing a want of jurisdiction over the subject-matter of the action or the person of the

defendant,<sup>1</sup> and that no judgment can be of any validity beyond the state wherein it was entered, unless the defendant was a citizen of such state, or unless, by some act of his, he submitted himself to its laws, and thereby became subject to the authority of its courts.<sup>2</sup> The same general principle is applied to foreign judgments, as will be made apparent by quotations from the opinion of the court of queen's bench in a recent English case.<sup>3</sup> This case was an action on a judgment of a French tribunal, given against the defendants for default of appearance. Among the pleas to the action was "a special plea asserting that the defendants were not resident or domiciled in France, or in any way subject to the jurisdiction of the French court, nor did they appear, and that they were not summoned, nor had any notice or knowledge of the pending of the proceedings, or any opportunity of defending themselves therefrom." On the trial it appeared that the plaintiff was a Dane, resident in France, and that the defendants also were Danes, but they were resident in London. The action in the French court was to obtain damages for an alleged violation of a contract. The place at which the contract was made did not clearly appear; but "the fair intendment from the evidence was that it was made in London." "The following admissions were made, namely: that the judgment was regular, according to French law; that it was given in favor of the plaintiff, a foreigner domiciled in France, against the defendants, domiciled in England, and in no sense French subjects, and having no property in France." It also appeared that process was issued out of the French court, "and the French consulate in London served on the defendants a copy of the citation." The jury found that the defendants had knowledge and notice of the summons and of the pendency of the action in time to make

<sup>1</sup> *Ante*, secs. 560-568.

<sup>2</sup> *Ante*, sec. 564.

<sup>3</sup> *Schibaby v. Westenholz*, L. R. 6 N. S. 93; 19 Week. Rep. 587. See also *Warren v. Kingsmill*, 8 U. C. Q. B. 407; *Burn v. Bletcher*, 23 U. C. Q. B. Q. B. 155; 40 L. J. Q. B. 73; 24 L. T., 28.

their defense in the French court. Blackburn, J., in delivering the opinion of the court of queen's bench, said: "We were much pressed on the argument with the fact that the British legislature has, by the common-law procedure act, 1852, conferred a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration, principally, which induced me at the trial to entertain the opinion which I then expressed and have since changed. And we think that if the principle on which foreign judgments were enforced was that which is loosely called 'comity,' we could hardly decline to enforce a foreign judgment given in France against a resident of Great Britain under circumstances hardly, if it all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France.

"Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be, whether the acts of the British legislature, rightly construed, gave us jurisdiction over the foreigner; for we must obey them. But if judgment being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation, which the American courts could recognize, to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners.

"Again, it was argued before us that foreign judgments obtained by default, where the citation was (as in the present case) by an artificial mode prescribed by the laws

of the country in which the judgment was given, were not enforceable in this country, because such a mode of citation was contrary to natural justice; and if this were so, doubtless the finding of the jury in the present case would remove that objection. But though it appears by the report of *Buchanan v. Rucker*, 1 Camp. 63, that Lord Ellenborough in the hurry of *nisi prius* at first used expressions to this effect, yet when the case came before him *in banco* (9 East, 192), he entirely abandoned what (with all deference to so great an authority) we cannot regard as more than declamation, and rested his judgment on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction. 'Can,' he said, 'the island of Tobago pass a law to bind the rights of the whole world?'

"The question we have now to answer is, Can the empire of France pass a law to bind the whole world? We admit, with perfect candor, that in the supposed case of a judgment obtained in this country against a foreigner, under the common-law procedure act, being sued on in a court of the United States, the question for the court of the United States would be, Can the island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No; but every country can pass laws to bind a great many persons; and therefore the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce.

"Now, on this we think some things are quite clear on principle, if the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them. Again, if the defendants had been, at the time when the suit was commenced, resident in the country, so as to have the benefit of its laws protecting them, or as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

"If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this, we should like to hear the question argued. But every one of those suppositions is negatived in the present case.

"Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterward say that the judgment of that tribunal was not binding upon him.

"In the case of *General Steam Navigation Co. v. Guillou*, 11 Mees. & W. 877, 894, on a demurrer to a plea, Parke, B., in delivering the considered judgment of the court of exchequer, then consisting of Lord Abinger, C. B., Parke, Alderson, and Gurney, BB., thus expresses himself: 'The substance of the plea is, that the cause has been already adjudicated upon, in a competent court, against the plaintiffs, and that the decision is binding upon them, and that they ought not to be permitted again to litigate the same question. Such a plea ought to have had a proper commencement and conclusion. It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance; but it is not to be understood that we feel much doubt on that question. They do not state that the plaintiffs were French subjects, or resident, or even present, in France when the suit began, so as to be bound by reason of allegiance or temporary presence by the decision of a French court, and they did not select the tribunal and sue as plaintiffs,—in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer in an adverse suit in a foreign country, whose laws they were under no obligation to obey.'

"It will be seen from this that those very learned

judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment merely by appearing to defend themselves against it. On the other hand, in *Simpson v. Fogo*, 1 Johns. & H. 18, 29 L. J. Ch. 657, 1 Hem. & M. 195, 32 L. J. Ch. 249, where the mortgagees of an English ship had come into the courts of Louisiana to endeavor to prevent the sale of their ship, seized under an execution against the mortgagors, and the courts of Louisiana decided against them, the vice-chancellor and the very learned counsel who argued in the case seem all to have taken it for granted that the decision of the court of Louisiana would have bound the mortgagees had it not been in contemptuous disregard of English law. The case of *General Steam Navigation Co. v. Guillou*, 11 Mees. & W. 877, was not referred to, and therefore cannot be considered as dissented from; but it seems clear that they did agree in the latter part of the opinion they expressed.

"We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Drissac v. Rathbone*, 6 Hurl. & N. 301, 30 L. J. Ex. 238, is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favor, he is bound.

"In *Douglas v. Forrest*, 4 Bing. 703, the court, in deciding in favor of a party suing on a Scotch judgment, say: 'We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the law of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given while the debtor resided in it.' Those circumstances are all

negated here. We should, however, point out that while we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas v. Forrest*, 4 Bing. 703, we doubt very much whether the possession of property locally situated in that country and protected by its laws does afford such a ground. It should rather seem that while every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfill the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France.

"We think, and this is all we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal."<sup>1</sup>

The decisions in the United States upon the subject of foreign judgments are infrequent. The law on that subject must therefore be regarded as not well settled. So far as jurisdictional inquiries are involved, no doubt the courts in this country would permit a party against whom a foreign judgment was sought to be used to avoid its effect to the same extent which is authorized by the English cases, and that no person would be held bound in this country by an adjudication made in some other country, unless he was a resident of or submitted himself to the courts of that country.<sup>2</sup>

<sup>1</sup> *Schibasy v. Westenholz*, L. R. 6 Q. B. 155; 40 L. J. Q. B. 73; 24 L. T., N. S., 93; 19 Week. Rep. 587; *Roussillon v. Roussillon*, 11 Cent. L. J. 270.

<sup>2</sup> *Bischoff v. Wethered*, 9 Wall. 182; *Bissell v. Briggs*, 9 Mass. 462; 6 Am. Dec. 88; *Middlesex Bank v. Butman*, 29 Me. 19; *Burnham v. Webster*, 1 Wood. & M. 172; *Story's Conflict of Laws*, sec. 608; *Rankin v. Goddard*, 54 Me. 23; 39 Am. Dec. 718; 55 Me. 389; *Foster v. Glasner*, 27 Ala. 391; *Corly v. Wright*, 4 Mo. App. 443; *Graham v. Spencer*, 14 Fed. Rep. 603; *Dorr v. Lippman*, 5 Clark & F. 1; *Long v. Hammond*, 40 Me. 204; *McEwan v. Zimmer*, 38 Mich. 765; 31 Am. Rep. 332; *Shepard v. Wright*, 113 N. Y. 582; *Thorn v. Salmonson*, 37 Kan. 441; *Battle v. Jones*, 6 Ired. Eq. 567; *Smith v. Grady*, 68 Wis. 215.

With respect to questions of jurisdiction, judgments of courts of foreign nations are governed substantially by the same rules which are applicable to the judgments of the courts of our sister states. The courts of one nation have no authority over persons resident, or immovable property situate within, the territorial limits of another nation,<sup>1</sup> unless founded upon the voluntary submission of such persons to the jurisdiction of a foreign court. The jurisdiction of foreign courts of superior or general jurisdiction is, however, presumed, and therefore need not be alleged by one who wishes to claim the benefit of their adjudications.<sup>2</sup> It therefore devolves upon one against whom a foreign judgment of a court of general jurisdiction is asserted, by his pleading and evidence to deny and disprove every fact and circumstance from which jurisdiction over him might be inferred. Jurisdiction over him being presumed, he must allege and establish facts from which the inference must necessarily arise that in his case the presumption is contrary to the facts.<sup>3</sup> If the defendant, though a non-resident, not subject to the jurisdiction of a foreign court, appears in the action, he cannot avoid the effect of the judgment entered therein against him by showing that he appeared merely to protect his property from seizure upon a judgment by default.<sup>4</sup>

§ 589. **Jurisdiction of Absentees.** — The English courts, no doubt, are not disposed to disregard a judgment rendered in a foreign country merely because the service of process was constructive and the defendant was at the

<sup>1</sup> *Monroe v. Douglas*, 4 Sand. Ch. 126; *Story's Conflict of Laws*, sec. 591.

<sup>2</sup> *Robertson v. Struth*, 5 Q. B. 941; *Dav. & M.* 773; 8 Jur. 404; *Gunn v. Peakes*, 36 Minn. 177; *Horton v. Critchfield*, 18 Ill. 133; 65 Am. Dec. 701; *Bruckman v. Taussig*, 7 Col. 561; *Dore v. Thornburgh*, 90 Cal. 64.

<sup>3</sup> *Addams v. Worden*, 6 L. C. Rep. 237; *McLean v. Shields*, 9 Ontario,

699; *Montreal Min. Co. v. Cuthbertson*, 9 U. C. Q. B. 78; *Cowan v. Braidwood*, 1 Man. & G. 882; 2 Scott N. R. 138; 9 Dowl. Pr. 27; *Reynolds v. Fenton*, 3 Com. B. 187; 10 Jur. 668; 16 L. J. Com. P. 15.

<sup>4</sup> *Voinet v. Barrett*, 55 L. J. Q. B. 39; 34 Week. Rep. 161; *De Cosse Drissac v. Rathbone*, 6 Hurl. & N. 301; 30 L. J. Ex. 288.



time beyond the jurisdiction of the court. It must be shown that the defendant was not domiciled in and did not owe allegiance to the nation whose courts proceeded against him in his absence, because, if he did owe such allegiance to or was domiciled in the country, it was not repugnant to natural justice to provide some means of compelling him to pay his debts, even after he had departed from the country.<sup>1</sup>

§ 590. **Jurisdiction of Corporations.**—The members of a company formed in England to carry on business in a foreign country are bound, in respect to the transactions of that company, by the laws of the country where the business is carried on. If a statute of the foreign country authorize the company to be sued in the name of its chairman, a judgment so recovered is as conclusive on the members of the company in England as any other foreign judgment, and cannot be avoided by showing that they received no summons and had no notice of the suit.<sup>2</sup> To a suit in England on a French judgment the defendant pleaded that he never was a resident of France during or since the accrual of the cause of action, nor was subject to the laws of France, nor served with process, nor did he have any notice or knowledge of the suit. The plaintiff, in reply, stated that the defendant was member of a company in France by holding shares therein; that by law of that country it was necessary for defendant to elect a domicile; that such domicile was selected at Paris; that service of notice was left at such domicile, as provided by the laws of France. This replication was held to be good, on the ground that natural justice was not violated by holding a man bound by a particular mode of notification to which he had agreed to submit.<sup>3</sup>

<sup>1</sup> *Douglas v. Forrest*, 4 Bing. 686; 42 L. T., N. S., 679; 28 Week. Rep. 623.  
*Cowan v. Braidwood*, 9 Dowl. Pr. 27.  
 The rule is the same in Canada: *Gauthier v. Blight*, 5 U. C. C. P. 122. See also *Copin v. Adamson*, 2 Barn. & Adol. 951; *Roussillon v. Roussillon*, L. R. 14 Ch. Div. 351; 49 L. J. Ch. Div. 339; *Bank of Australasia v. Harding*, 9 Com. B. 661; *Bank of Australasia v. Nias*, 16 Q. B. 717.  
<sup>2</sup> *Vallis v. Dumergue*, 4 Ex. 290; *Copin v. Adamson*, 3 Cent. L. J. 208.

§ 591. **Fraud.**—Both in England and the United States, fraud in its procurement is a good ground on which to avoid the effect of a foreign judgment.<sup>1</sup> A foreign judgment may be disregarded, both at law and in equity, when it is shown to have been obtained through fraud. But because the plea of fraud is a good defense to an action at law on such judgment, a court of equity will not interfere with the action at law, but will leave defendant to make his defense there.<sup>2</sup> Whether fraud in the trial of the cause, consisting of the production of evidence which is claimed to have been false, or any other form of fraud against which the party injured might have protected himself at the trial, may be successfully urged to avoid a foreign judgment, is not well settled, the English cases inclining to admit this defense,<sup>3</sup> and the American to exclude it.<sup>4</sup>

§ 592. **Difference between Judgments as a Cause of Action, and as a Plea in Bar.**—We have seen that a foreign judgment can have no extraterritorial obligation, if the defendant was not subject to the jurisdiction of the courts of the country wherein it was rendered, and that it is in all cases liable to be impeached for fraud in its procurement. Perhaps two other questions in reference to this class of judgments could not be mentioned in regard to which the authorities are at all in unison. A distinction has been made between the effect of a foreign judgment sought to be enforced as a cause of action, and that of the same judgment asserted by the defendant as a bar. This distinction is supported by the decision of Lord Chief Justice Eyre in *Phillips v. Hunter*, 2 H. Black.

<sup>1</sup> *Reimers v. Druce*, 23 Beav. 145; *Q. B.* 295; 52 *L. J. Q. B.* 1; 47 *L. T.*, *Price v. Dewhurst*, 8 Sim. 279; *Lazier* *N. S.*, 325; 31 *Week. Rep.* 57.

*v. Westcott*, 26 *N. Y.* 146; 82 *Am. Dec.* 404; *Henderson v. Henderson*, 6 *Q. B.* 288; *Rankin v. Goddard*, 54 *Me.* 28; 89 *Am. Dec.* 718; 55 *Me.* 389; *Story's Conflict of Laws*, sec. 608; *Cammell v. Sewell*, 3 *Hurl. & N.* 617; *Abouloff v. Oppenheimer*, *L. R.* 10

*Q. B.* 295; 52 *L. J. Q. B.* 1; 47 *L. T.*, *N. S.*, 325; 31 *Week. Rep.* 57.

<sup>2</sup> *Ochsenbein v. Papelier*, *L. R.* 8 *Ch.* 695; 21 *Week. Rep.* 516; 28 *L. T.*, *N. S.*, 58, 459.

<sup>3</sup> *Abouloff v. Oppenheimer*, *L. R.* 10 *Q. B.* 295.

<sup>4</sup> *Hilton v. Guyott*, 42 *Fed. Rep.* 252.

410, in which he said: "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts; and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory perhaps as in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory; not as conclusive, but as matter *in pais*; as a consideration *prima facie* sufficient to raise a promise. We examine it as we do all other considerations or promises; and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us."<sup>1</sup> This opinion, so far as it treats foreign judgments as merely *prima facie* when brought forward as a cause of action, but as conclusive when called in question incidentally or by a plea in bar (except as a merger of a cause of action), is sustained by a large number of English and American cases.<sup>2</sup>

§ 593. **Decree of Dismissal.**—Another distinction has been made by which a decree of dismissal has been treated as more conclusive than a decree sustaining a claim. Thus Lord Kames<sup>3</sup> says: "A foreign decree sustaining the claim is not one of those universal titles which ought to be made effectual everywhere. It is a title that depends on the authority of the court whence it issued, and therefore has no coercive authority *extra territorium*. And yet as it would be hard to oblige the person who claims on a decree to bring

<sup>1</sup> See also *Woodburne v. Plummer*, 1 Barn. & C. 625.

<sup>2</sup> *Walker v. Witter*, 1 Doug. 1; *Buttrick v. Allen*, 8 Mass. 273; 5 Am. Dec. 105; *Galbraith v. Neville*, 5 East, 75; *Wood v. Gamble*, 11 Cush. 8; 59 Am. Dec. 135; *Williams v. Preston*, 3

J. J. Marsh. 600; 20 Am. Dec. 179; *Bigelow on Estoppel*, 192; *Tarleton v. Tarleton*, 4 Moore & S. 20; *Taylor v. Phelps*, 1 Har. & G. 492; *Griswold v. Pitcairn*, 2 Conn. 85.

<sup>3</sup> 2 Kames Eq., 3d ed., 365.

a new action against his party in every country to which he may retire, therefore common utility, as well as regard to a sister court, has established a rule among all civilized nations that a foreign decree shall be put in execution, unless some good exception is opposed to it in law or equity, which is making no wider step in favor of the decree than to pronounce it just till the contrary be proved. A foreign decree which, by dismissing the claim, affords an *exceptio rei judicata* against it enjoys a more extensive privilege. We not only presume it to be just, but will not admit of any evidence of its being unjust. A decree dismissing a claim may, it is true, be unjust, as well as a decree sustaining it. But they differ widely in one capital point: in declining to give redress against a decree dismissing a claim, the court is not guilty of authorizing injustice, even supposing the decree to be unjust; the utmost that can be said is, that the court forbears to interpose in behalf of justice. But such forbearance, instead of being faulty, is highly meritorious in every case where private justice clashes with public utility. The case is very different with respect to a decree of the other kind; for to award execution upon a foreign decree, without admitting any objection against it, would be, for aught the court can know, to support and promote injustice." Though the distinction here sought to be established between foreign decrees is substantially like that pointed out in *Phillips v. Hunter*, 2 H. Black. 410, in regard to foreign judgments, it does not seem to be recognized in any of the reported cases; and if ever so recognized, it must undoubtedly be obliterated by the recent decisions in the highest courts of England, in which the merits and justice of the sentences of the courts of foreign countries, pronounced in cases of which those courts had jurisdiction, are no longer proper subjects of inquiry.

§ 594. **Conclusive in England.** — But the distinction made in *Phillips v. Hunter*, 2 H. Black. 410, against judg-

ments sought to be enforced as causes of action, while it has no doubt been generally recognized in the United States, is now entirely overthrown in England. An action brought in that country on a foreign judgment cannot be defeated by an examination into the merits of the judgment. Conceding that the judgment is valid and still in force in the country where it was rendered; that the court had jurisdiction over the cause and the parties; and that the judgment is free from the taint of fraud in its procurement, — there remains no ground for avoiding its effect as a cause of action, unless it be that the court of the foreign country intentionally disregarded the law of England, in a case where the rights of the parties depended on a proper application of that law.<sup>1</sup>

§ 595. **Mistake of Foreign Law.** — The recent case of *Godard v. Gray*, L. R. 6 Q. B. 139, disposes of the question whether a mere error in regard to English law, entering into a judgment rendered in a foreign country, and occasioning such a determination as could not have been obtained in the English courts, is a good defense to an action on such foreign judgment brought in the English courts. The case is so recent and so authoritative a construction, not only of the law necessarily involved, but also of the whole question concerning the conclusive nature of foreign adjudications, that we shall proceed to copy into this work the greater portion of the opinion of the court: "It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce

<sup>1</sup> *Ferguson v. Mahon*, 11 Ad. & E. 179; *Henderson v. Henderson*, 6 Ad. & E. N. S., 288; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Bank of Australasia v. Nias*, 16 Q. B. 717; 20 L. J. Com. P. 284; *Bank of Australasia v. Harding*, 9 Com. B. 661; *De Cosse Brissac v. Rathbone*, 6 Hurl. & N. 301; 30 L. J. Ex. 238; *Vauquelin v. Bouard*, 15 Com. B., N. S., 341; 10 Jur., N. S., 566; 33 L. J. Com. B. 78; 12 Week. Rep. 128; 9 L. T., N. S., 582; *Paul v. Roy*, 15 Beav. 433; *Ricardo v. Garcias*, 12 Clark & F. 368; *Measina v. Petrocchino*, L. R. 4 P. C. 144; *Warrener v. Kingsmill*, 8 U. C. Q. B. 407; *Vaughan v. Campbell*, 5 L. C. 431.

the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England, and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams v. Jones*, 13 Mees. & W. 633: 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are enforced.' And taking this as the principle, it seems to follow that anything which negatives the existence of this legal obligation, or excuses the defendant from the performance of it, must form a good defense to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the judgment must be examinable. Probably the defendant may show that the judgment was obtained by the fraud of the plaintiff; for that would show that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the foreign court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him.

"There are many *dicta* and opinions of very eminent lawyers tending to establish that the defendant in an action on a foreign judgment is at liberty to show that the judgment was founded on a mistake, and that the judgment is so far examinable. In *Houlditch v. Donegall*, 2 Clark & F. 477, Lord Brougham goes so far as to say: 'The language of the opinions on one side has been so strong that we are not warranted in calling it merely the inclina-

tion of our lawyers—it is their decision—that in this country a foreign judgment is only *prima facie*, not as conclusive, evidence of a debt.’ But there certainly is no case decided on such a principle; and the opinions on the other side of the question are at least as strong as those to which Lord Brougham refers.

“Indeed, it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of pleading shows that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter-evidence negating the existence of the original cause of action.

“If, on the other hand, there is a *prima facie* obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply where it is brought on that of a foreign tribunal. But there still remains a question which has never, so far as we know, been expressly decided in any court.

“It is broadly laid down by the very learned author of Smith’s Leading Cases, in the original note to *Doe v. Oliver*, that ‘it is clear that if the judgment appear on the face of the proceedings to be founded on a *mistaken notion*

of the English law,' it would not be conclusive. For this he cites *Novelli v. Rossi*, 2 Barn. & Adol. 757, which does not decide that point, and no other authority; but the great learning and general accuracy of the writer makes his unsupported opinion an authority of weight, and accordingly it has been treated with respect.

"But the doctrine as laid down by Mr. Smith does apply here; and we must express our opinion on it, and we think it cannot be supported, and that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of the foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake of the English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact.

"It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law, and any other mistake.

"If, indeed, foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to inquire whether the foreign court had made a mistake, or to allow the defendant to assert that it had, yet if the foreign court itself admitted its blunder, they would not then act; but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defense



which shows that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defense shall be admitted if it is easily proved, and reject it if it would give the court great trouble to investigate it. Yet on what principle can we admit as a defense that there is a mistake of English law apparent on the face of the proceedings, and reject a defense that there was a mistake of Spanish or even Scotch law apparent in the proceedings? or that there was a mistake of English law not apparent on the proceedings, but which defendant avers that he can show did exist?

"The whole law was much considered and discussed in *Castrique v. Imrie*, L. R. 4 H. L. 414, where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship. The decision of the house of lords was, that the defendant's title derived under that sale was good, notwithstanding that mistake, Lord Colonsay pithily saying: 'It appears to me that we cannot enter into an inquiry as to whether the French courts proceeded correctly, either as to their own course of procedure or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of English law. Nor can we inquire whether they were right in their views of the English law. The question is, whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship?'"<sup>1</sup>

§ 596. **Rule of the Early American Cases.** — The majority of the reported American cases were decided prior to those English decisions which have resulted in enhancing the dignity of foreign judgments in that country. It will accordingly be found that the greater number of the American courts at one time declared in favor of the law as

<sup>1</sup> See also *Scott v. Pilkington*, 2 *Alivon v. Furnival*, 1 *Crompt. M. & R. Best & S.* 11; 8 *Jur., N. S.*, 557; 6 *277*; *Bequet v. MacCarthy*, 2 *Barn. & L. T.*, *N. S.*, 21; 31 *L. J. Q. B.* 81; *Adol.* 951.

it is stated in *Phillips v. Hunter*, 2 H. Black. 410, and by which any foreign judgment is regarded as examinable on the merits.<sup>1</sup> Thus one American judge has said that he would allow the *prima facie* obligation of a foreign judgment to be rebutted by showing that the merits of the claim now in controversy were not in fact considered in the former suit, owing to some accident, mistake, or agreement of the parties, or owing to any other sufficient excuse; that he would allow the *prima facie* obligation to be rebutted most easily when the judgment proceeded from the courts of a barbarous or semi-barbarous nation acting on no established principles of jurisprudence, and would also discriminate in favor of persons who had not willingly resorted to the courts of the foreign country, and against those persons who had voluntarily submitted themselves to such courts.<sup>2</sup>

§ 597. **Rule of the Later Cases.** — The considerations which have influenced the adjudications in the English courts will no doubt make themselves felt in America. No prediction in regard to future decisions is more likely to be realized than that our courts will in time place foreign judgments on the same footing which they now occupy in the mother country. Indeed, the two great American jurists, Judges Kent and Story, at an early day advanced most satisfactory reasons in favor of the conclusiveness of foreign judgments. The latter, in his *Conflict of Laws*, section 607, ably pointed out the difficulties involved in the law of foreign judgments as it was then understood. The former, in pronouncing judgment, in the year 1811, in the case of *Taylor v. Boyden*,

<sup>1</sup> See Story's *Conflict of Laws*, sec. 608; *Bissell v. Briggs*, 9 Mass. 461; 6 Am. Dec. 88; *Bartlett v. Knight*, 1 Mass. 400; 2 Am. Dec. 36; *Buttrick v. Allen*, 8 Mass. 273; 5 Am. Dec. 105; *Jordan v. Robinson*, 3 Me. 167; *Pelton v. Platner*, 13 Ohio, 209; 42 Am. Dec. 197; *Boston etc. Co. v. Hoit*, 14 Vt. 92; *Smith v. Lewis*, 3 Johns. 157; 3 Am. Dec. 489; *Benton v. Burgot*, 10 Serg. & R. 246; *Taylor v. Barron*, 30 N. H. 79; 64 Am. Dec. 281. In Canada, the effect of foreign judgments is by statute declared to be *prima facie* only: *Manning v. Thompson*, 17 U. C. C. P. 606.

<sup>2</sup> *Burnham v. Webster*, 1 Wood. & M. 172.

8 Johns. 173, said: "To try over again as of course every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other states, and would be carrying the doctrine of re-examination to an oppressive extent. It would be the same as granting a new trial in every case and upon every question of fact. Suppose a recovery in another state, or in any foreign court, in an action for a tort, as for an assault and battery, false imprisonment, slander, etc., and the defendant was duly summoned, and appeared and made his defense, and the trial was conducted orderly and properly, according to the rules of a civilized jurisprudence, is every such case to be tried again here on the merits? I much doubt whether the rule can ever go to this length. The general language of the books is, that the defendant must impeach the judgment by showing affirmatively that it was unjust, by being irregularly or unfairly procured." The decisions subsequently made in the same state kept pace with the change of opinion going on in England,<sup>1</sup> until in the case of *Lazier v. Westcott*<sup>2</sup> the most advanced position was attained and the rule was broadly laid down that "the same principles and decisions which we have made as to judgments from the courts of other states of the Union should be applied to foreign judgments." Other American cases sustain substantially the same view,<sup>3</sup> except that they include "mistake" as one of the grounds for avoiding a foreign judgment, without showing what or whose mistake it is that may be employed for that purpose.<sup>4</sup> In a recent case in New York it was held that a foreign judgment had the same effect in that state as evidence against

<sup>1</sup> *Monroe v. Douglas*, 4 Sand. Ch. 126; *Cummings v. Banks*, 2 Barb. 601.

<sup>2</sup> *Lazier v. Westcott*, 26 N. Y. 146; 82 Am. Dec. 404.

<sup>3</sup> *Messier v. Amery*, 1 Yeates, 533; 1 Am. Dec. 316; *McEwan v. Zimmer*, 38 Mich. 765; 31 Am. Rep. 332; *Baker v. Palmer*, 83 Ill. 568; *Hilton v. Guy-*

*ott*, 42 Fed. Rep. 249; *Glass v. Blackwell*, 48 Ark. 50; *Lea v. Deakin*, 11 Biss. 23.

<sup>4</sup> *Low v. Mussey*, 41 Vt. 393; *Silver Lake Bank v. Harding*, 5 Ohio, 545; *Rankin v. Goddard*, 55 Me. 339. The decision of this case on a former appeal is reported in *Rankin v. Goddard*, 54 Me. 22; 89 Am. Dec. 718.

an indemnitor, and in favor of the person against whom the foreign judgment was recovered, as though it were a domestic judgment.<sup>1</sup> Sometimes language has been used to the effect that a judgment of a foreign court will be respected and enforced only when it is not repugnant to natural justice. It would probably be impossible to formulate a definition of "natural justice" which all courts would accept as correct. All the courts in this country would, however, doubtless agree that it is contrary to natural justice to condemn a party, or to decide any issue in which he is interested, without giving him some notice of the proceeding against him and some opportunity of presenting his cause of action or defense to the consideration of the court, or, even after notice, to require him to appear before the courts of a foreign nation to which he owes no allegiance and of which he is not a resident, either temporary or permanent, unless for the purpose of asserting his claim to property situate within the territorial limits of such nation; but when a foreign court has jurisdiction of the subject-matter and the parties, and either hears them or gives them an opportunity to be heard according to some authorized mode of conducting and determining judicial proceedings in the country in which the court is held, we do not understand that its judgment can be deprived of its effect as *res judicata* in this country by showing that the conclusion or determination of the court does not conform to our ideas of "natural justice."<sup>2</sup>

In treating of judgments of other states we have shown that the rule that one state is under no obligation to enforce the penal laws and police regulations of another affects judgments founded thereon, and prevents their enforcement beyond the state in which they were rendered.<sup>3</sup> This rule applies with equal, and perhaps with

<sup>1</sup> *Konitzky v. Meyer*, 49 N. Y. 253; *Crawley v. Isaacs*, 16 L. T., N. S., 571. 529.

<sup>2</sup> *Hilton v. Guyott*, 42 Fed. Rep. <sup>3</sup> *Ante*, sec. 575.

increased, force against the judgments of foreign courts, and permits an inquiry respecting the obligations sought to be enforced by their aid; and if it is ascertained to have its origin in the penal or revenue laws or the police regulations of a foreign country, the resulting judgment will not constitute a cause of action capable of assertion in our courts.<sup>1</sup> A novel case was determined by Judge Woodruff, of the southern district of New York, in which the conclusion reached is more defensible on the ground that the judgment under consideration was founded upon the police regulations of a foreign nation than upon any other ground. The plaintiff had, in the empire of France, married the daughter of the defendant, who was then residing in that country. Under a law of France the plaintiff sued the defendant in a French court, and obtained a judgment that the former should furnish and pay the latter eighteen thousand francs per year for the support of himself and his child. This judgment was based upon the French law, which obliges fathers-in-law to make an allowance for their sons-in-law when the latter are in need. The father-in-law was temporarily residing in France when the judgment was rendered against him. He prosecuted an appeal, and the judgment was affirmed. Judge Woodruff sustained a demurrer to the complaint based on this judgment. He seemed to sustain the demurrer partly on the ground that the temporary residence in France did not subject the parties to the jurisdiction of the courts of that country; partly on the ground that the judgment was rendered in pursuance of local laws and regulations which could not thus be made binding in a foreign country; and partly on the ground that foreign judgments were enforced through comity, and that such comity forbids, rather than requires, a violation of the policy of our own laws and a violence to the rights of our own citizens.<sup>2</sup>

<sup>1</sup> *Ogden v. Folliott*, 3 Term Rep. 733;   <sup>2</sup> *De Brimont v. Penniman*, 10 Addams v. Worden, 6 L. C. Rep. 237.   Blatchf. 436.

§ 598. **Foreign Decree.** — The English courts, in addition to sustaining the judgments of foreign courts as considerations for actions of *assumpsit*, and as pleas in bar, also recognize decrees in equity made in foreign tribunals; and a bill to carry such a decree into effect may be sustained in the English courts.<sup>1</sup> Such a decree will also sustain an action brought to recover a sum ascertained by it to be due from one party to the other.<sup>2</sup>

§ 599. **Decrees Discharging Debtors.** — It is a general rule that a debt discharged by the laws of the country where it is created is discharged in every other country;<sup>3</sup> and that a debt discharged by the law of any country, other than that in which it was created, continues in full force beyond the country where the decree of discharge was entered.<sup>4</sup>

§ 600. **Control of Equity over Rights Secured in Foreign Courts.** — As a general rule, every creditor may pursue his debtor and his debtor's property into any foreign jurisdiction in which he or it may be found, and may avail himself of all the legal remedies which the courts of the foreign state are willing to afford him. If, for instance, a ship belonging in England is taken to the United States, and a creditor of the owner, residing in England, commences proceedings in the United States against the vessel, whereby the creditor secured advantages which he could not have obtained at home, the courts of equity in England will not compel him to yield up the advantages thus gained.<sup>5</sup>

§ 601. **Interested Tribunal.** — In England it has been held that the judgment of a foreign tribunal composed of

<sup>1</sup> *Martin v. Nicholls*, 3 Sim. 458; *Houlditch v. Donegall*, 8 Bligh, N. S., 301.

<sup>2</sup> *Henley v. Soper*, 8 Barn. & C. 16.  
<sup>3</sup> *Ellis v. McHenry*, L. R. 6 Com. P. 228; citing *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28; *Gardner v. Houghton*, 2 Best & S. 743.

<sup>4</sup> *Ellis v. McHenry*, L. R. 6 Com. P. 228; citing *Lewis v. Owen*, 4 Barn. & Ald. 654; *Phillips v. Allen*, 8 Barn. & C. 477; *Bartley v. Hodges*, 1 Best & S. 375. But see *post*, sec. 605 b.

<sup>5</sup> *Liverpool Marine Credit Co. v. Hunter*, L. R. 3 Ch. 469.

persons interested in the property in dispute, who have decided for themselves and in their own favor, should be disregarded.<sup>1</sup>

§ 602. **Appeal.**—The pendency of an appeal taken from a foreign judgment is no bar to an action on such judgment, though perhaps it may afford sufficient ground to justify the court wherein the action is brought in interposing to prevent a possible abuse of its process.<sup>2</sup>

§ 603. **Must be Supported by a Complaint.**—In the absence of proof to the contrary, it will be presumed that the courts of foreign nations are not authorized to act without some written statement of a cause of action being made. Therefore, in California, a record of a foreign court will be disregarded unless it shows the allegations of fact on which the court acted in rendering judgment.<sup>3</sup>

§ 604. **Judgments of Courts of the Confederate States.**—In some of the states of the late southern confederacy a strong disposition was formerly manifested to entirely disregard the judicial proceedings of courts acting under the confederate authority, and within territory not under the control of the federal government. The supreme court of Alabama, speaking upon this subject, said: "The judgment was rendered on September 12, 1863. It is known to the court as a part of the judicial history of the state that the court in which this judgment was rendered constituted a portion of 'one of the departments of a government established in hostility to the constitution of the United States.' It has been settled that the acts of the legislature of such a government are invalid. If this is admitted, and it seems to me it cannot be denied, it cannot well be conceived how the judgments of

<sup>1</sup> Price v. Dewhurst, 8 Sim. 279.

guelin v. Bonard, 15 Com. B., N. S.,

<sup>2</sup> Scott v. Pilkington, 2 Best & S.

367.

41; 8 Jur., N. S., 557; 31 L. J. Q. B.

<sup>3</sup> Young v. Rosenbaum, 39 Cal.

81; 6 L. T., N. S., 81. See also Van-

646.

such a government can be better or more valid than its laws. The reasons which invalidate the one assail the other also. Both are parts of a whole; and if the whole is bad, as a general principle, the parts cannot be good."<sup>1</sup> The question received further judicial consideration in the same state, resulting for a time in the conclusion that judgments rendered during the Rebellion by courts acting by virtue of powers granted by or exercised in subordination to the government of the confederate states should not be entirely disregarded. Neither were such judgments to be received with the respect accorded to domestic judgments. They were to be allowed about the same effect as a foreign judgment; namely, they were to be received as *prima facie* evidence, and carried into effect, unless some reason was shown why they ought to be ignored.<sup>2</sup> The latest decisions in this state place these judgments upon a higher foundation, and give them a more definite and unavoidable effect. "Our conclusion, then," said the supreme court of the state, "is, that the courts of Alabama, during the war, were a portion of the rightful government of the state; and that the judgments, decrees, and proceedings not in violation of the constitution and laws of the United States, or of any right or obligation arising under them, and not in violation of the constitution of Alabama, are valid, and must have operation and effect accordingly."<sup>3</sup> Therefore a sale of property under execution upon a judgment entered during the late war by the courts of a state then in rebellion is valid at law, and will not be vacated in equity upon grounds which would be insufficient to warrant the vacating of the sale had it been made under some other judgment.<sup>4</sup>

In Arkansas the constitution of the state adopted after

<sup>1</sup> Ray v. Thompson, 43 Ala. 454; 94 Am. Dec. 696. 610. See also Pettywit v. Kellogg, 1 Cin. Rep. 17; Steere v. Tenney, 50

<sup>2</sup> Martin v. Hewitt, 44 Ala. 418; N. H. 461.

Bibb v. Avery, 45 Ala. 691; Mosely v. <sup>3</sup> Parks v. Coffey, 52 Ala. 42; Hill

Tuthill, 45 Ala. 621, 650; 6 Am. Rep. v. Huckabee, 52 Ala. 155.

710; McSwean v. Faulks, 46 Ala. <sup>4</sup> Hill v. Armistead, 56 Ala. 118.



the close of the Rebellion provided "that all the action of the state under authority of the convention which assembled in Little Rock on the fourth day of March, 1861, of its ordinances or its constitution, whether legislative, executive, *judicial*, or military, was and is hereby declared null and void." The supreme court of the state has on several occasions determined that courts acting during the Rebellion had no authority to compel defendants to appear before them, and therefore that judgments based on service of summons on such defendants were therefore void.<sup>1</sup> But the later cases in this state show that the earlier ones upon this subject are no longer tenable. In *Henry v. Cline*, 29 Ark. 414, it was held that the judgments of the courts of Texas rendered during the Rebellion must be received as those of a sister state, and given the full faith and credit exacted by the constitution and laws of the United States in behalf of judgments rendered in a sister state.

In Ohio, on the other hand, a very elaborate consideration of the question resulted in a decision that a judgment rendered after the secession of a state, in an action brought in Arkansas before such succession, against a citizen of Ohio, was invalid. In this case the defendant had appeared by attorney and filed his plea prior to the commencement of the war, and this same attorney continued to act. The court seemed to think that the attempted secession of the state and the acts done in pursuance of it divested the court of its jurisdiction over the non-resident defendant, and also divested the attorney of the power to continue to appear and represent the defendant, and that the proceedings and judgment were *coram non judice* and void.<sup>2</sup>

Doubtless the more recent and authoritative decisions upon the subject show that judgments and decrees

<sup>1</sup> Penn. v. Tollison, 26 Ark. 545; Thompson v. Mankin, 26 Ark. 586; 7 Am. Rep. 600; 22 Am. Rep. 340.  
<sup>2</sup> Pennywit v. Foots, 27 Ohio St. 628; Timms v. Grace, 26 Ark. 598.

rendered in the rebellious states during the Rebellion between person within and subject to their jurisdiction are, unless connected with proceedings or purposes involving an attack on the national government, to be regarded as valid. If the tribunal in which judgment was rendered was created and acting before the state became involved in secession and rebellion, its authority continued, because the ordinances of secession and the governments set up under them were all invalid; and it was not possible through the enactment of void laws to destroy a pre-existing legal jurisdiction.<sup>1</sup> But courts created by acts of the confederate congress are regarded as never having any judicial authority. Thus when several defendants sought to shield themselves in an action for malicious imprisonment, by showing that they acted as officers of a court known as the "District Court of the Confederate States of America for the Northern District of Alabama," the supreme court of the United States held as follows: "The act of the confederate congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted."<sup>2</sup> But judgments rendered in the various state courts during the Rebellion have generally been regarded as valid, unless tainted with proceedings or in furtherance of objects designed to give aid and comfort to the confederate states government. But the effect of such judgments can in no case extend to persons who were residing in those parts of the United States not involved in the Rebellion.<sup>3</sup>

<sup>1</sup> *White v. Cannon*, 6 Wall. 443; 100; 1 Abb. 169; 8 Int. Rev. Rec. 194; *Pepin v. Lachenmeyer*, 45 N. Y. 27. *Livingston v. Jordan*, 10 Am. Law

<sup>2</sup> *Hickman v. Jones*, 9 Wall. 197. Reg. 53; Chase's Dec. 454; *French v. See Freeman v. Bass*, 34 Ga. 355; 89 Tumlin, 10 Am. Law Reg. 642; 14 Int. Rev. Rec. 140; *Cook v. Oliver*, 1

<sup>3</sup> *Cuyler v. Ferrill*, 8 Am. Law Reg. Woods, 437.

The extent to which proceedings had in the several states during the Rebellion will be recognized and enforced by the national courts was thus stated by the supreme court of the United States: "We admit that the acts of the several states in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crimes prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in times of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were are not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the constitution."<sup>1</sup>

The judicial proceedings which were before the court and occasioned the use of the language embraced in the foregoing quotation were the proceedings of a probate court of the state of Alabama. They were sustained, except in so far as they approved an investment in confederate bonds, and directed a payment to the legatees to be made in those bonds. The action of the court "in this respect was an absolute nullity, and can afford no protection to the executor in the courts of the United States. The officers and tribunals exercising authority within the confederate states during the Rebellion were by the people recognized as being rightful officers and tribunals; their

<sup>1</sup> *Horn v. Lockhart*, 17 Wall. 580.

authority was generally respected, and if not respected voluntarily, they generally had the power to compel obedience, if not respect." They ought therefore to be treated, for most purposes, as officers and tribunals *de facto*. Hence where certain acts of incorporation were passed by the legislature of a state then in rebellion, and it was claimed that these enactments proceeded from a body possessing no lawful authority, and that the corporations formed under them were not entitled to recognition, the supreme court very properly said: "No doubt the legislature of Georgia in 1861 and 1863, when the enactments were made for the incorporation of these plaintiffs, was not the legitimate legislature of the state. The state had thrown off its connection with the United States, and the members of the legislature had repudiated or had not taken the oath by which the third section of the sixth article of the constitution requires the members of the several legislatures to be bound. But it does not follow from this that it was not a legislature the acts of which were of force when they were made and are in force now. If not a legislature of the state *de jure*, it was at least a legislature *de facto*. It was the only law-making body in existence. Its members acted under color of office, by an election, though not qualified according to the requirements of the constitution of the United States. Now, while it must be held that all their acts in hostility to that constitution, or to the Union, of which the state was an inseparable member, have no validity, no good reason can be assigned why all their other enactments, not forbidden by the constitution, should not have the force which the law generally accords to the action of *de facto* officers. . . . All the enactments of the *de facto* legislatures in the insurrectionary states during the war, which were not hostile to the Union, or to the authority of the general government, and which were not in conflict with the constitution of the United States, have the same validity as if they had been the enactments of a legitimate

legislature. Any other doctrine than this would work great and unnecessary hardship upon the people of those states, without any corresponding benefit to the citizens of other states, and without any advantage to the national government."<sup>1</sup>

The courts in states in rebellion, it is clear, could not exercise any authority over the officers and soldiers of the United States by which the latter could be called to account before such courts, civilly or criminally, and required to explain or justify acts done by them as such officers or soldiers. They might lawfully disregard a summons to appear in those courts, and a judgment by default entered against any of them for want of such appearance is void. This, however, did not result from any infirmity in the organization or jurisdiction of such courts, but from the well-established principle that an officer or soldier is not, in time of war, amenable to the civil authorities for his military acts.<sup>2</sup>

§ 604 a. **Judgments Rendered in the District of Columbia** have been considered as not within the provisions of the constitution and laws of the United States providing for the effect which the courts of one state must give to the judgments of other states. Judgments rendered in this district have therefore been treated as foreign judgments.<sup>3</sup>

§ 605. **Are not Records.** — In two respects foreign judgments are, by a concurrence of the authorities, treated differently from judgments of other states of this Union. Though proceeding from superior courts of general jurisdiction, they are not records, and cannot be declared on as such. The actions brought upon them must therefore

<sup>1</sup> *United States v. Insurance Co.*, 22 Wall. 99; *Ford v. Surget*, 97 U. S. 594. This question is elaborately discussed in *Williams v. Bruffy*, 96 U. S. 176.

<sup>2</sup> *Dow v. Johnson*, 100 U. S. 158; *Coleman v. Tennessee*, 97 U. S. 509; *Lamar v. Browne*, 92 U. S. 187.

<sup>3</sup> *Draper's Ex'rs v. Gorman*, 8 Leigh, 628.

be in *assumpsit*.<sup>1</sup> Judge Story, in his Conflict of Laws, section 599 a, in commenting upon the opinion of Lord Chief Justice Eyre in *Phillips v. Hunter*, 2 H. Black. 410, says: "It would seem a natural result of that view that if a suit was brought for the same cause of action in an English court which had already been decided in favor of either party in a foreign court of competent jurisdiction, and was final and conclusive there, that judgment might be well pleaded in bar of the new suit upon the original cause of action, and would, 'if *bona fide*, be conclusive." If there was ever any reason why, in order to be consistent with themselves, the courts should hold that a foreign judgment was operative as a merger of the original cause of action, that reason has certainly become more imperative, since the dignity and importance of those judgments have been so recognized and enforced by the latest adjudications of courts of last resort in England and in this country. While a defendant who succeeded in defeating a claim at law or in equity in the courts of any foreign country could always avail himself in the common-law courts of this adjudication in his favor as a complete plea in bar to another action involving the same demand, and while under the most recent decisions the principle of *res judicata* is enforced in favor of the plaintiff as well as of the defendant in a foreign judgment, yet the law of merger has never been applied against the plaintiff in such a judgment, and he is, both in England and in America, unquestionably entitled to disregard the judgment in his favor, and sue upon the original cause of action.<sup>2</sup>

§ 605 a. **Foreign Probate.** — It is now well settled in the United States, England, and France that the succession and distribution of the personal estate of a decedent must be in accordance with the law of the domicile of

<sup>1</sup> *Harris v. Saunders*, 4 Barn. & C. 411; *Buttrick v. Allen*, 8 Mass. 273; 5 Am. Dec. 106; *McFarlane v. Derbyshire*, 8 U. C. Q. B. 12; *Gooding v. Hingston*, 20 Mich. 439; *Grant v. Easton*, L. R. 13 Q. B. 302; *Mellin v. Horlick*, 31 Fed. Rep. 865.

<sup>2</sup> See *ante*, sec. 220; Story's Conflict of Laws, sec. 599 a; *Fergus v. Wardlaw*, 3 Kerr, 665.

such decedent at the time of his decease,' while, as to the real estate, the law of the place where it is situate controls.<sup>1</sup> The mere collection and administration of personal assets proceeds under the laws of the country in which they are situate, and creditors of the decedent are entitled to seek satisfaction therefrom in accordance with the laws of such country; but after the administration is so far complete that the local claims and laws are satisfied, the remaining assets will be transmitted to the administration of the decedent's domicile for final distribution.<sup>2</sup> A decree of a foreign court of probate declaring a claimant to be the natural son and heir of a person who died within the jurisdiction of the court is conclusive as an adjudication of the same question when it is brought in issue in another country in connection with the personal property of the deceased in the last-named country.<sup>3</sup>

§ 605 b. **Foreign Proceedings in Bankruptcy or Insolvency** may be considered,—1. With reference to their effect upon the title to the property of the bankrupt or insolvent; and 2. To their effect upon his obligations, and the consequent right of his creditors to enforce such obligations notwithstanding any discharge therefrom granted by the judgment of the foreign court of bankruptcy or insolvency. Conveyances and assignments authorized and directed by such court, and made by one of its officers, or coerced from the bankrupt or insolvent, doubtless transfer the title to his property situate within the territorial limits of the state or nation in whose courts the proceedings are conducted, or upon vessels which, though upon

<sup>1</sup> Wharton's Conflict of Laws, sec. 560, 561; Story's Conflict of Laws, secs. 480-484; Brock's Adm'r, 51 Ala. 85; De Sobry v. De Laistre, 2 Har. & J. 191; 8 Am. Dec. 535; Desobats v. Berquier, 1 Binn. 336; 2 Am. Dec. 448; Deconche v. Savotier, 3 Johns. Ch. 190; 8 Am. Dec. 478; Holmes v. Remsen, 4 Johns. Ch. 460; 8 Am. Dec. 581; Embry v. Millar, 1 A. K. Marsh. 300; 10 Am. Dec. 732; Bryan v.

Moore, 11 Mart. (La.) 26; 13 Am. Dec. 347; Dorsey's Ex'r v. Dorsey's Adm'r, 5 J. J. Marsh. 280; 22 Am. Dec. 33; Sneed v. Ewing, 5 J. J. Marsh. 460; 22 Am. Dec. 41; Oliver v. Townes, 2 Martin, N. S., 93.

<sup>2</sup> Miller's Estate, 3 Rawle, 212; 24 Am. Dec. 345; Dawes v. Boylston, 9 Mass. 337; 6 Am. Dec. 72.

<sup>3</sup> Doglioni v. Crispin, L. R. 1 Eng. & Ir. App. 301; 35 L. J., N. S., 122.

the high seas, are deemed a part of such state or nation;<sup>1</sup> but as to property situate beyond those limits such transfers are inoperative.<sup>2</sup> Thus an assignment in England under proceedings in bankruptcy does not so operate upon property of the bankrupt then situate in this country as to prevent its subsequent seizure under execution or attachment by American creditors,<sup>3</sup> nor does such assignment seem to have any effect whatever in this country,<sup>4</sup> unless, perhaps, in a controversy between the bankrupt and his assignees.<sup>5</sup>

A discharge granted to a bankrupt or insolvent is operative in his favor against every person over whom the court had jurisdiction. Over the creditors resident in the state or nation wherein the discharge is granted it has undoubted jurisdiction, and the discharge is valid and operative against them, both there and elsewhere, unless its effect is annulled or limited by some constitutional inhibition or restriction;<sup>6</sup> and if both the debtor and creditor are residents of the state or nation, it is of no consequence that the contract was made and is to be performed elsewhere.<sup>7</sup> As against non-residents who have not appeared in the foreign court, nor in any way submitted either their claims or their persons to its jurisdiction, any discharge granted by it must generally be wholly ineffective in any other state or country.<sup>8</sup> But it

<sup>1</sup> *Abraham v. Plestoro*, 3 Wend. 538; 20 Am. Dec. 738; *Smith v. Eaton*, 36 Me. 298; 58 Am. Dec. 746; *Crapo v. Kelly*, 16 Wall. 610; *Geilinger v. Philippi*, 133 U. S. 257.

<sup>2</sup> *Saunders v. Williams*, 5 N. H. 213; *U. S. v. Bank of U. S.*, 8 Rob. (La.) 262, 414; *Walters v. Whitlock*, 9 Fla. 86; 76 Am. Dec. 607; *Johnson v. Hunt*, 23 Wend. 91; *Oakey v. Bennett*, 11 How. 33; *Watkins v. Holman*, 16 Pet. 26.

<sup>3</sup> *Milne v. Moreton*, 6 Binn. 353; 6 Am. Dec. 466; *Blake v. Williams*, 6 Pick. 286; 17 Am. Dec. 372.

<sup>4</sup> *Dawes v. Boylston*, 9 Mass. 337; 6 Am. Dec. 72; *Kelly v. Crapo*, 45 N. Y. 90; 6 Am. Rep. 35; *Osgood v. Maguire*, 61 N. Y. 529; *Abraham v. Plestoro*, 3

Wend. 538; 20 Am. Dec. 738; *Ackerman v. Cross*, 40 N. Y. 486; *Willitts v. Waite*, 25 N. Y. 583.

<sup>5</sup> *Robinson v. Crowder*, 4 McCord, 519; 17 Am. Dec. 762; *Holmes v. Remsen*, 4 Johns. Ch. 489; 8 Am. Dec. 581.

<sup>6</sup> *Baker v. Wheaton*, 5 Mass. 509; 4 Am. Dec. 71, and note; *Norton v. Cook*, 9 Conn. 314; 23 Am. Dec. 342, and note; *Blanchard v. Russell*, 13 Mass. 1; 7 Am. Dec. 106, and note; *Peck v. Hibbard*, 26 Vt. 702; 62 Am. Dec. 605.

<sup>7</sup> *Marsh v. Putnam*, 3 Gray, 551.

<sup>8</sup> *Norton v. Cook*, 9 Conn. 314; 23 Am. Dec. 342; *Smith v. Buchanan*, 6 East, 6; *Munroe v. Guillaume*, 3 Keyes, 30; 3 Abb. App. 334; *Smith v. Smith*, 2 Johns. 235; 3 Am. Dec. 410,



may be and has been insisted that the place where a contract was made or is to be performed is of controlling importance in determining what courts have jurisdiction to discharge it, and that though the creditor is a resident of another state or nation, his residence does not carry with it the debt due him, so that the courts where it was created may not discharge the debtor from all obligation to pay it. We apprehend there is no doubt that the courts of a country where an obligation arose or was created may grant a discharge therefrom which is there operative, whether the creditor is resident or non-resident, because unless restrained by some constitutional limitation, laws may be enacted in any country withdrawing all aid for the enforcement of obligations by legal proceedings, and there are numerous decisions to the effect that when a contract is discharged by proceedings in the country where it was created or made payable, and where the debtor resides, it must be regarded as discharged everywhere, though the creditor was a non-resident and did not appear in the foreign court.<sup>1</sup> These decisions are, however, necessarily in conflict with the principles adopted and enforced by the supreme court of the United States, as well as by other courts, to the effect that a bankruptcy or insolvency statute can have no extraterritorial operation, and that a citizen of one state cannot be required to appear in the courts of another and to submit to their exercise of jurisdiction over him, or to their discharge of an obligation due him, though it was created or is to be performed in the state where such courts have jurisdiction.<sup>2</sup> It is true that these principles were, in the cases cited, applied only to discharges granted

and note; *White v. Canfield*, 7 Johns. 117; 5 Am. Dec. 249; *Mitchell v. McMillan*, 3 Mart. (La.) 676; 6 Am. Dec. 690; *Vanuxem v. Hazlehurst*, 4 N. J. L. 192; 7 Am. Dec. 582.

<sup>1</sup> *May v. Breed*, 7 Cush. 15; 54 Am. Dec. 700; *Ballantine v. Golding*, 1 Cooke, 487; *Potter v. Brown*, 5 East, 124; *Very v. McHenry*, 29 Me. 206;

*In re Kinsley*, 1 Low. 221; *Long v. Hammond*, 40 Me. 204; *Gardiner v. Houghton*, 2 Best & S. 743.

<sup>2</sup> *Baldwin v. Hale*, 1 Wall. 223; *Felch v. Bugbee*, 48 Me. 9; 77 Am. Dec. 203; *Anderson v. Wheeler*, 25 Conn. 613; *Whitney v. Whiting*, 35 N. H. 457; *Murphy v. Manning*, 134 Mass. 488.

by the courts of one state, when sought to be asserted against the citizens of another, but it seems unreasonable to concede to the courts of foreign nations an authority over the citizens of a state which is denied to the courts of sister states.

§ 605 c. **Foreign Divorce.**—Some states and nations have been very loath to recognize and enforce judgments or decrees annulling a contract of marriage and freeing one or both the spouses therefrom. This has been especially true when the contract has been annulled by the courts of some sovereignty other than that in which it was entered into, and upon some ground not regarded as sufficient in the country where the contract was consummated. In the celebrated case of *Rex v. Lolley*,<sup>1</sup> decided in England in the year 1812, the twelve judges were unanimously of the opinion that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo matrimonii* for any ground upon which it could not be thus dissolved in England. These were the material facts of that case: Lolley was convicted of bigamy for marrying a wife in England while the wife of his former marriage was yet living. His defense was, that his first wife had, before the second marriage, obtained a divorce from him in the consistorial court of Scotland. The judges unanimously denied the efficacy of this divorce. Lolley was sentenced to transportation, but was afterward pardoned. The doctrine of Lolley's case was frequently assailed, but, upon the whole, seems rather to have been reaffirmed than overthrown in the courts which considered themselves as bound by the laws of England.<sup>2</sup> There seems, however, to be some doubt whether the judges in Lolley's case intended to deny, under all circumstances, the authority of the courts of a foreign state to dissolve an English marriage, or whether such denial

<sup>1</sup> *Rex v. Lolley*, 2 Russ. & R. O. C. Pro. & D. 161; *Warrender v. Warrender*, 2 Clark & F. 541.

<sup>2</sup> *Shaw v. Attorney-General*, L. R. 2

was confined to cases in which the parties had not acquired *bona fide* a domicile in that country to whose tribunals they resorted for a dissolution of their marital obligations.<sup>1</sup> At all events, Lolley's case does not affirm that a divorce in a foreign state would be invalid if upon grounds entitling the applicant to a divorce in England.<sup>2</sup> If an Englishwoman contracts a marriage in England to a resident of another country, his domicile becomes hers, and a divorce granted to her in the country of his domicile, where both reside, is valid in England, though for a cause for which a divorce could not be obtained in the country in which the marriage was solemnized.<sup>3</sup>

The Scotch courts assume jurisdiction to dissolve marriages contracted in England, and such dissolution may be valid in the former country and invalid in the latter, so that two English subjects may be divorced in Scotland, but remain married in England.<sup>4</sup> Where a husband, after his marriage in England, removed to the United States, and became domiciled there, it was held that his wife, who remained in England, could there prosecute an action for divorce on the ground of adultery, the citation having been personally served on the husband in America.<sup>5</sup> But where a wife had separated from her husband in England, and then removed to Iowa, and remained two years, where she then procured a divorce without personal service of process on her husband, it was disregarded in England.<sup>6</sup> The court here manifestly proceeded upon the ground that the constructive service of process ought not to be tolerated in such circumstances. In this case the judge ordinary said: "The principles upon which the

<sup>1</sup> Conway v. Beasley, 3 Hagg. Ecc. 652; Tovey v. Lindsay, 1 Dow, 117, 127; Duntze v. Levett, Ferg. 403; 3 Eng. Ecc. 508.

<sup>2</sup> Shaw v. Gould, L. R. 3 Eng. & Ir. App. 55, 86.

<sup>3</sup> Harvey v. Farnie, L. R. 6 Pro. & D. 35; 60 L. J. P. D. 17; 43 L. T., N. S., 737; 26 Week. Rep. 409; affirmed in

L. R. 8 App. C. 43; 52 L. J. P. D. 33; 48 L. T., N. S., 273; 31 Week. Rep. 433.

<sup>4</sup> Warrender v. Warrender, 2 Clark & F. 541; Conway v. Beasley, 3 Hagg. Ecc. 652.

<sup>5</sup> Deck v. Deck, 2 Swab. & T. 90; 29 L. J. 129.

<sup>6</sup> Shaw v. Attorney-General, L. R. 2 Pro. & D. 156.

question here raised must be decided have been so recently discussed in several cases in the court of ultimate appeal that it is not necessary to enter upon the discussion at large on the present occasion. It may be sufficient to observe,—1. That *Lolley's* case has never been overruled; 2. That in no case has a foreign divorce been held to invalidate an English marriage between English subjects, where the parties were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English courts would recognize and act upon such a divorce appears to be a question not wholly free from doubt; but the better opinion seems to be, that they would do so if the divorce be for a ground of divorce recognized as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals. To my mind it is manifestly just and expedient that those who may have permanently taken up their abode in a foreign country, resigning their English domicile, should, in contemplation of English law, be permitted to resort with effect to the tribunals exercising jurisdiction over the community of which, by their change of domicile, they have become a part, rather than they should be forced back for relief upon the tribunals of the country they have abandoned. But the inquiry is needless in this case, because it seems to me to be neither just nor expedient that a woman whose domicile is English, and whose husband's domicile is English, should, whilst living separate from him in a foreign state, in which he has never, up to the time of the divorce, set his foot, be permitted to resort to the local tribunal, and without any notice to her husband, except an advertisement which he never saw and was never likely to see, obtain a divorce against him behind his back. No case has ever yet decided that a man can, according to the laws of this country, be divorced from his wife by the tribunals of a country in which he has never had either domicile or residence. He has never submitted himself, either

directly or inferentially, to the jurisdiction of such a court, and has never, by any act of his own, laid himself open to be affected by its process, if it never reaches him. A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte*, and take place in the absence of the party affected by them." So where a husband, married in England, left that country to avoid his creditors, but without its being shown that he intended to abandon his English domicile, and in the country to which he went obtained a decree of divorce from his wife, who remained in England, it was held that such decree was ineffectual.<sup>1</sup> While the law may not be finally settled or absolutely certain, we apprehend that at the present day the decided weight of authority is in favor of recognizing a foreign divorce, when the parties were permanently domiciled *bona fide* in the country in which they were divorced, irrespective of the place of their marriage;<sup>2</sup> that in the United States it is sufficient that one only of the parties has become domiciled in the state where the divorce is granted;<sup>3</sup> but this rule does not prevail in England;<sup>4</sup> and the courts of New York deny the power of the courts of a foreign nation to grant a judgment of divorce against a woman domiciled in the state of New York, not personally served with process within the country in whose courts the judgment is entered, though her husband may be domiciled in that country.<sup>5</sup>

<sup>1</sup> *Briggs v. Briggs*, 11 Cent. L. J. 46; *Sess. Cas. S., N. S.*, 142; *Roth v. Roth*, 104 Ill. 35; 44 Am. Rep. 81; *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652.

<sup>2</sup> *Conway v. Beasley*, 3 Hagg. Ecc. 639; *Blumenthal v. Tannenholz*, 9 Rep. 52; *Seawall v. Seawall*, 122 Mass. 156; *Prosser v. Warner*, 47 Vt. 667; 19 Am. Rep. 132; *Hanover v. Turner*, 14 Mass. 227; 7 Am. Dec. 203, and note. The courts of Scotland grant divorces to parties not permanently domiciled in that country: *Shields v. Shields*, 15

<sup>3</sup> 2 *Bishop on Marriage and Divorce*, secs. 156-171.

<sup>4</sup> *Le Sueur v. Le Sueur*, L. R. 1 P. D. 139; 42 L. J. P. D. 73; 24 Week. Rep. 616.

<sup>5</sup> *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652.

## CHAPTER XXVIII.

## JUDGMENTS IN REM.

- § 606. Definition of.
- § 607. Different proceedings *in rem*.
- § 608. Probates of wills and grants of administration.
- § 609. Decree of sale.
- § 610. Marriage and divorce.
- § 611. Jurisdiction.
- § 612. How avoided, if from foreign court.

## PART II.—OF JUDGMENTS AND DECREES IN ADMIRALTY.

- § 613. General nature of.
- § 614. Jurisdiction.
- § 615. Effect as *res judicata*.
- § 616. Sentence of acquittal.
- § 617. Effected as *res judicata* limited to persons interested in the *res*.
- § 618. Grounds of sentence must appear.
- § 618 a. Impeaching.

§ 606. Definition.—We come now to the consideration of a class of judgments very well understood, but quite difficult to describe. A judgment *in rem* was, with some diffidence, defined “to be the judgment of a court of exclusive, or at least peculiar, jurisdiction, declaratory either of the nature and condition of some particular thing, or of the condition and *status* of some particular person.”<sup>1</sup> These are the views expressed in the supreme court of Vermont: “A judgment *in rem* I understand to be an adjudication pronounced upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this: that the latter judgment is in form, as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself. A judgment *in rem* is founded on a proceeding instituted, not against the person as such, but against or upon the thing or subject-matter itself whose state or condition is

<sup>1</sup> 2 Phillips on Evidence, 5.

to be determined. It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration of the *status* of the thing, and it *ipso facto* renders it what it declares it to be."<sup>1</sup> In a case before Chief Justice Marshall, he undertook to point out the distinguishing characteristics of judgments *in rem*, and in so doing said: "What is the nature of a proceeding *in rem*? And in what does its specific difference from an ordinary action consist? Is every action in which a specific article is demanded a proceeding *in rem*? If it were, a writ of right which demands lands, of detinue which demands a personal chattel, would be a proceeding *in rem*, to which all the world would be parties, and by which the rights of all the world would be bound. But this all know is not the law. What, then, is the rule by which cases of this description are to be ascertained? I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself by the service of the process and making proclamation authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties. The rule is one of convenience and of necessity. In cases to which it applies, it would often be impossible to ascertain the persons whose property is proceeded against, and it is presumable that the person whose property is seized is either himself attentive to it, or has placed it in the care of some person who has the power, and whose duty it is to represent him and assert his claim. Such claim may be asserted, but the jurisdiction of the court does not depend on its assertion. The claimant is a party, whether he speaks or is silent, whether he asserts his claim or abandons it."<sup>2</sup>

But perhaps the most correct as well as the most concise definition anywhere given of a judgment *in rem* is that to be found in Smith's Leading Cases, viz.: that "it

<sup>1</sup> Woodruff v. Taylor, 20 Vt. 65.      <sup>2</sup> Mankin v. Chandler & Co., 2 Brock. 125.

is an adjudication upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose," depending for its effect on this principle, that it is "a solemn declaration proceeding from an accredited quarter concerning the *status* of the thing adjudicated upon, which *very declaration operates accordingly upon the status of the thing adjudicated upon*, and *ipso facto* renders it such as it is thereby declared to be."<sup>1</sup>

"*In rem* is understood to be a technical term, taken from the Roman law, and there used to distinguish an action against the thing from one against the person, the terms *in rem* and *in personam* always being the opposite one of the other; an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specific person, but against or with reference to a specific thing, and so against whom it might concern, or 'all the world.' A proceeding brought to determine the *status* of the thing itself, the *particular thing*, and which is confined to the subject-matter *in specie*, is *in rem*, the judgment being intended to determine the state or condition, and *ipso facto* to render the thing what the judgment declares it to be, while a proceeding which seeks the recovery of a personal judgment is *in personam*. In the former, process may be served on the thing itself, and by such service and making proclamation the court is authorized to decide upon it, without other notice to persons, all the world being parties; while in the latter, in order to give the court power to adjudicate, there must be service upon those whose rights are sought to be affected."<sup>2</sup>

"Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for claims asserted by the libelants or plaintiffs. The property itself is in such actions the defendant, and except in

<sup>1</sup> 2 Smith's Lead. Cas. 585, 586; 6th Am. ed., 660; State v. Central Pac. R. R. Co., 10 Nev. 80; Lord v. Chad-

bourne, 42 Me. 443; 66 Am. Dec. 290.

<sup>2</sup> Cross v. Armstrong, 44 Ohio St. 624.



cases arising during war, for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case."<sup>1</sup>

But from none of these descriptions can a complete and correct idea of the class now known as "judgment *in rem*" be obtained. The definition first quoted was particularly inaccurate in asserting that judgments of this class must proceed from "a court of exclusive, or at least peculiar, jurisdiction." For, in truth, all kinds and classes of courts may proceed *in rem* whenever the law authorizes them to do so; and a judgment resulting from such proceeding is equally effective, whether the court wherein it was pronounced was of general or of special, of superior or of inferior, of concurrent or of exclusive, jurisdiction. The description given by Chief Justice Marshall places too much stress upon the idea that *the thing* on which the judgment operates should be taken into possession on or by the service of process, and ignores the large class of cases in which, instead of proceeding against any *thing*, courts adjudicate upon the *status* of persons and obtain their authority to do so by a service of their process, which, whether actual or constructive, is still in its nature *personal*. The definition found in Smith's Leading Cases is substantially the same as that which we have quoted from the case of *Woodruff v. Taylor*, 20 Vt. 65. But when we undertake to say that a judgment *in rem* is necessarily "an adjudication upon the *status* of some particular subject-matter," it seems to us that we either overlook the only class of judgments to which the term *in rem* ought ever to have been applied, or else we give to the word

<sup>1</sup> *Freeman v. Alderson*, 119 U. S. 187. See also *The Sabine*, 101 U. S. 333.

*status* an unusual and unauthorized signification. Laws exist under which property is responsible for damages done by it, for taxes imposed upon it, or for expenses incurred in its repairs and management. These same laws often authorize the obligation by them imposed upon the property, to be enforced by proceedings in which the property is the defendant, and in which no service of process is required, except upon such property. The judgment resulting from such a proceeding is *in rem*, and satisfaction thereof is produced by an execution authorizing the sale of the property. The sale acts upon *the property*, and in so acting necessarily affects all claimants thereto. But the judgment does not affect the *status* of the property, except in the same sense that a judgment against A B for a sum of money affects his *status*. In the one case it is settled that an obligation rests upon certain property; in the other, it is settled that a similar obligation rests on a certain person. Each judgment adjudicates upon a *status*, so far as it establishes that the defendant is in the state or condition of being accountable to the plaintiff for a sum of money. Neither judgment establishes any *status* different from that established by the other. Therefore a judgment against a brute, a tract of land, or a vessel, for a sum of money, to be satisfied by execution against such brute, land, or vessel, though clearly *in rem*, no more determines a *status* than though the defendant were a person.

Judgments *in rem*, it is well known, are not, as the name implies, confined to adjudications *against things*. They are rendered in many instances where the prior proceedings are entirely *in personam*, as in cases establishing or dissolving marriages. Neither are they, as is frequently stated, always binding on *the whole world*, for decrees of divorce rendered in one of these United States have frequently been disregarded in the other states, and they would almost certainly be treated as nullities in England, if the marriage were contracted in that country

between natives thereof, and the defendant retained his English domicile; and the probate of a will, though considered as a judgment *in rem* in the state in whose courts it is probated, would have no effect over real property beyond the jurisdiction of that state. The distinguishing characteristic of judgments *in rem* is, that wherever their obligation is recognized and enforced as against any person, it is equally recognized and enforced as against *all persons*. It seems to us that the true definition of a judgment *in rem* is, that it "is an adjudication" against some person or thing, or "upon the *status* of some subject-matter," which, wherever and whenever binding upon *any* person, is equally binding upon *all persons*. It is true that this as well as the other definitions is a mere statement of the effect of a judgment *in rem*, while that which is most needed is the formulation of some description or test, the application of which to any judgment record will result in ascertaining whether or not it is *in rem*; for the difficulty is, not in deciding the effect of a judgment, but in ascertaining to which class it belongs. As a judgment which is strictly *in rem* binds all persons, whether named as parties therein, or in any anterior part of the record or proceedings, or not, it must follow that the proceedings must be such as may indicate to all persons that their interest in the subject-matter is or may be imperiled, and that they may appear at some time and place for the purpose of making known and protecting their interests; for as against claimants having no notice of the proceeding and no opportunity to be heard, it is not judicial in its character, and whatever may be determined against them is not entitled to respect as a judgment.<sup>1</sup> We therefore suggest that a judgment is *in rem* whenever the process and proceedings are such as to warn all persons that the court may render judgment affecting certain property and their interests therein, and that they must,

<sup>1</sup> Windsor v. McVeigh, 93 U. S. 278; Sum. 601; Hassall v. Wilcox, 130 Bradstreet v. Neptune Ins. Co., 3 U. S. 493.

at or within a time specified, appear before the court if they wish to protect those interests from judicial condemnation. The fact that, under the mode of serving process provided by law, some claimant or even all claimants of the property do not receive *actual* notice of the proceeding will not prevent the judgment from operating *in rem*, if the mode adopted was reasonable under the circumstances, and calculated to give notice to the claimants, and the process was such as that the claimants, had it been seen by them, should have known therefrom that their interests were or might be imperiled, and that they might be heard for the preservation of such interests.

§ 607. **Different Proceedings in Rem.**—Perhaps neither of the definitions or descriptions given in the preceding section will, of itself, enable the reader to determine in every instance whether a particular judgment is *in rem*, because the particular cases in which adjudications are binding *on all persons* are to be ascertained only by reference to statutes, or to the common law as expressed in the reported decisions of its judges, and judgments are often characterized as *in rem* when they are not so, and when such effect as must be conceded to them is due solely to the fact that the court had an absolute or qualified jurisdiction over the parties thereto, and when, if the jurisdiction over the parties were disproved, the judgment would be treated as utterly void. Among the proceedings resulting in judgments or decrees *in rem* are those in the prize courts of all civilized countries, those in the English “court of exchequer, in cases of forfeitures for treasons, felonies, or a violation of the revenue laws. Proceedings are had in the *nature* of proceedings *in rem*, and without notice, in courts admitting wills to probate and granting administration, and the expectancies of heirs and distributees swept away, when the weakness of infancy, or residence in a foreign land, should, seemingly, protect them, because of the permanent political consideration

that the rights of property thus situated should be speedily settled by a legal ascertainment of them. All of which adjudications are dictated by public policy and necessity, regardless, to some extent, of private rights."<sup>1</sup> In the foregoing quotation the assertion is made that proceedings *in rem* may be without notice, and yet be binding upon the whole world. Whether this assertion is true will be considered in a subsequent section.<sup>2</sup> If it is true in any class of cases, proceedings in insolvency and bankruptcy must be ranked as of that class. By these proceedings a debtor, sometimes on his own petition and sometimes on that of his creditors, or of some portion of them, is adjudged to be a bankrupt or insolvent, and a transfer of his estate to an assignee for the benefit of his creditors results either as a consequence of such adjudication, or of a formal assignment made either by the debtor in person or by some officer of the court having power under the statute to act for him. The adjudication, at least when there is any notice to the parties interested to show cause against it, and possibly when granted upon the debtor's petition, though without notice, operates *in rem*, and while it remains in force conclusively establishes, as against all persons, the *status* of the debtor, to wit, that he is a bankrupt or insolvent, as he has been adjudged to be, and that he did commit the act of bankruptcy, or was in the condition of insolvency upon which the adjudication was founded.<sup>3</sup> Hence it has been held that where an adjudication was upon the ground that the debtor had executed a certain security as an unlawful preference to one of his creditors, the adjudication was conclusive against such creditor, though a non-resident, in a subsequent proceeding, that the security had been executed under the circumstances and for the forbidden purpose affirmed by the adjudica-

<sup>1</sup> *Pinson v. Ivey*, 1 Yerg. 349.

<sup>2</sup> *Post*, sec. 611.

<sup>3</sup> *Brown v. Smart*, 69 Md. 320; *Shawhan v. Wherritt*, 7 How. 643; *Baker v. Kunkel*, 70 Md. 392; *Lamp*

*Chimney Co. v. Brass etc. Co.*, 91 U. S. 661; *Lewis v. Sloan*, 68 N. C. 557; *Mount v. Manhattan Co.*, 41 N. J. Eq. 211.

tion.<sup>1</sup> So the judgment granting the bankrupt or insolvent a discharge is also *in rem*, and binding upon all persons over whose demands the court had power to act.<sup>2</sup> A judgment or order distributing the estate of a decedent, or ascertaining and naming his heirs, or containing a genealogical chart of his descendants or of the descendants of certain of his heirs, is "a judgment *in rem*, and is evidence of the facts adjudicated against all the world."<sup>3</sup> If property is seized for a breach of the excise or revenue laws, and judgment of forfeiture or condemnation is entered against it, such judgment is *in rem*, and conclusive against all persons.<sup>4</sup> Certain proceedings affecting public rights and conducted by public officials acting for and representing the public interests, such as the laying out or altering of public highways, or establishing the boundary lines between adjoining towns, are *in rem*, and binding upon all persons.<sup>5</sup> This rule is applied in England and in some of the United States to orders and decisions made under the poor-laws for the removal of paupers, and finding in what places they had legal settlements,<sup>6</sup> while in other parts of the United States judgments regarding the settlement of paupers are restricted in effect to the parties thereto.<sup>7</sup> A judgment of naturalization imports verity to the same extent as any other judgment of a court of record, and is alike protected from collateral assault.<sup>8</sup> It is a judgment *in rem* in so far as it establishes the *status* of the person naturalized to be that of a citizen of the United States. A judgment for taxes, for the partition of property, or the foreclosure of a lien is *in*

<sup>1</sup> *Brown v. Smart*, 69 Md. 320; *Baker v. Kunkel*, 70 Md. 392; *Taylor on Evidence*, 6th ed., secs. 1488, 1489.

<sup>2</sup> *Rayl v. Lapham*, 27 Ohio St. 452; *Thornton v. Hogan*, 63 Mo. 143; *Sheets v. Hawk*, 14 Serg. & R. 173; 16 Am. Dec. 486.

<sup>3</sup> *Ennis v. Smith*, 14 How. 430.

<sup>4</sup> *Whitney v. Walsh*, 1 Cush. 29; 48 Am. Dec. 590; *Scott v. Shearman*, 2 W. Black. 977; *Hart v. McNamara*, 4 Price, 154.

<sup>5</sup> *Pitman v. Town of Albany*, 34 N. H. 577; *Millcreek Township v. Reed*, 29 Pa. St. 195.

<sup>6</sup> *Cabot v. Washington*, 41 Vt. 168; *West Buffalo v. Walker Township*, 8 Pa. St. 177; *Pittsford v. Chittenden*, 58 Vt. 49.

<sup>7</sup> *Bethlehem v. Watertown*, 47 Conn. 237.

<sup>8</sup> *McCarthy v. Marsh*, 5 N. Y. 263; *State v. Hoeflinger*, 35 Wis. 393; *State v. Penney*, 10 Ark. 621.

*rem*, if the proceeding is against the property or against all owners and claimants thereof, though generally such judgments are against designated persons, and in effect are restricted to their interests.<sup>1</sup> Inquisitions of lunacy, resulting in a determination that the person respecting whom the inquiry is made is a lunatic, are conceded to be no more than *prima facie* evidence against third persons;<sup>2</sup> but in Massachusetts it has been held that the appointment of a guardian for a person, on the ground of his lunacy, was conclusive evidence of his want of capacity against a person subsequently making a payment to him with knowledge of the guardianship.<sup>3</sup> An action of replevin is not *in rem*, because, although it is for specific property, the jurisdiction of the court is dependent upon the personal service of the process, and its judgment is conclusive only upon the parties to the action, and their privies in person or estate.<sup>4</sup> In Iowa, proceedings by garnishment are deemed to be *in rem*, and the debtor who pays over money in such proceedings, in pursuance of the order of a court having jurisdiction, is protected from an action against him by his creditor, though the latter was not before the court when the order was made against the garnishee.<sup>5</sup> In Maine, certain proceedings to secure liens on logs are both *in rem* and *in personam*, and the court cannot proceed until it takes the steps necessary to give it jurisdiction over the property as well as over the person of the alleged owners.<sup>6</sup>

Where it appears that the law authorizes a proceeding against the estate or interest of some person, the judgment cannot be strictly *in rem*. It may reach the inter-

<sup>1</sup> As to judgments *in rem* for taxes, see *Mayo v. Ah Loy*, 32 Cal. 477; 91 Am. Dec. 595; and in partition, see *Nash v. Church*, 10 Wis. 303; 78 Am. Dec. 678; *ante*, sec. 307; *Pillsbury v. Dugan*, 9 Ohio, 117; 34 Am. Dec. 427; *Childs v. Hayman*, 72 Ga. 791.

<sup>2</sup> *Leonard v. Leonard*, 14 Fick. 280.

<sup>3</sup> *Certain Mahogany Logs*, 2 Sum. 592.

<sup>4</sup> *Moore v. Chicago etc. R. R. Co.*, 43 Iowa, 385.

<sup>5</sup> *Rogers v. Walker*, 6 Pa. St. 373; 47 Am. Dec. 470; *Den v. Clark*, 10 N. J. L. 217; 18 Am. Dec. 417; *Hughes v. Jones*, 116 N. Y. 67; 15 Am. St. Rep. 386.

<sup>6</sup> *Sheridan v. Ireland and Logs*, 66 Me. 133.

est of such person, if any he has, and thereby defeat the claims of all persons subsequently acquiring title under him, without impairing the rights of adverse claimants. Thus during the late Rebellion, the president was authorized to seize the estate and property of certain classes of persons then in the service of the confederate states, and proceedings *in rem* were authorized to secure the condemnation of such property. It was held, however, that such proceedings were not authorized against the property, but only against the estates and interests of certain persons therein, and hence that the judgment could not affect the estates and interests of other persons, and that the title of a purchaser under such judgment could be defeated by proving that the persons against whom the condemnation proceedings were directed had no interest in the property at the date of its seizure.<sup>1</sup> And whenever a proceeding, though formally *in rem*, is not in fact such, because it is directed against a particular claimant only, the judgment cannot affect the interests of third persons.<sup>2</sup> A number of actions and proceedings are sometimes spoken of as in the nature of proceedings *in rem*, which in truth are rather qualified proceedings *in personam* than proceedings *in rem*. The general rule that the jurisdiction of a court cannot extend to persons not citizens nor residents of the state or nation in which the court is held, if applied without limitation or exception, would result in non-residents owning or making claims to property within the state or nation, without giving its courts any authority to determine the claims made to such property, or enforcing liens against it, or coercing the payment out of it of the obligations of its owners to residents of the state or others. This difficulty has been met by characterizing proceedings against non-residents for the purpose of determining claims to or enforcing liens upon their prop-

<sup>1</sup> *Day v. Micon*, 18 Wall. 156; *Con- Phoenix Bank*, 83 N. Y. 318; 38 Am. rad v. Waples, 96 U. S. 279; *Risley v. Rep.* 421.

<sup>2</sup> *Dean v. Chapin*, 22 Mich. 275.



erty within the state, or of applying it to the payment of their debts, as *quasi* proceedings *in rem*. But the use of this and equivalent terms does not signify that the interest of any person not a party to the action is or can be affected by it, but rather that the judgment against the non-resident is restricted to its effect to his interest in the property, and binds him as to such interest, but in no other respect.<sup>1</sup> There may, however, be cases in which property is in the state, and even in the custody of the court, and in which the judgment disposing of it is neither *in rem* nor binding on a non-resident party to the action who did not appear therein. Thus it has been held, where an insurance corporation was sued in the state wherein it was located, and paid the money into court, and obtained an order requiring a non-resident claimant to appear and interplead with the plaintiff, and served such order on the non-resident personally in the state of his residence, that such order could not compel the non-resident claimant to appear, and that the judgment finally entered disposing of the moneys in court was not *in rem*, and constituted no defense to an action brought by the claimant against the corporation in the state wherein he resided.<sup>2</sup>

§ 607 a. Proceedings by Attachment are not, strictly speaking, *in rem*, and yet they are sometimes so spoken of; and in some respects their effect is more, and in others less, comprehensive than the effect of proceedings *in personam*. Thus by the seizure of the property, as where moneys are garnished, jurisdiction is acquired over the fund, so that orders may be made for its distribution or payment, which will bind the owner, though he has not appeared nor been personally summoned in the case,<sup>3</sup> provided such owner is in law or in fact a defendant in the action. But the judgment in such action must, in its

<sup>1</sup> *Ante*, sec. 120 a.

<sup>2</sup> 2 Smith's Lead. Cas., 7th Am. ed.,

<sup>3</sup> *Cross v. Armstrong*, 44 Ohio St. 613. 809.

effect, be restricted to the property before the court, and even as to that property, it is not conclusive upon the title, except as between the parties to the action and those in privity with them. Proceedings by attachment being the subject of divers statutory regulations, their effect must doubtless vary to correspond with the proceedings themselves. In some of the states, as in California, attachments issue for the purpose of creating a lien upon property, in order the more surely to obtain a satisfaction of the judgment, should one be recovered. The service of the writ is in no way connected with the service of the summons, or with the presence or absence of the defendant from the state, nor does such service give the court any jurisdiction to pronounce any judgment against person or property, nor relieve it of the necessity of proceeding with the service of the summons, in the same manner as if no attachment had issued.<sup>1</sup> It may well be doubted whether this proceeding is jurisdictional in its character; and if not, whether there is any mode by which the property in this state belonging to a non-resident may be reached and compelled to contribute to the payment of his debts. The courts of that state have, however, determined that when an attachment has been levied, though upon land which is not taken into the possession of the court or of any of its officers, and judgment is thereafter rendered against a non-resident, founded on constructive service of process, it is enforceable against the property so attached, but not otherwise valid, and will therefore support a sale of such property made thereunder.<sup>2</sup> Under the custom of London, the attachment of his property is all the notice the defendant has of the proceeding against him; none other is required. In the United States, on the other hand, a summons usually precedes or accompanies the attachment. If both the summons and the attachment are personally served in

<sup>1</sup> Cal. Code Civ. Proc., sec. 537-559.

<sup>2</sup> *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34.

the state, the proceeding becomes, to a great extent, *in personam*, except that the property attached must be applied to the satisfaction of the judgment. If the summons is not served, and the defendant does not appear, then the validity of the proceedings and judgment depends on the attachment; and as jurisdiction, if obtained at all, is acquired by the seizure of the property, and such further notice as the statute requires to be given, in connection with the attachment, the proceeding and judgment are often characterized as *in rem*, though they can never possibly bind any one not a party to the suit, nor in privity with such party.<sup>1</sup>

**§ 608. Grants of Probate and of Administration.—**

"A grant of *probate* or of administration is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him."<sup>2</sup> Actions or proceedings to set aside wills or to test their validity are also generally *in rem*,<sup>3</sup> while suits for their construction are *in personam*.<sup>4</sup> The probate of a will cannot be collaterally avoided on the ground that the will is a forgery, or that the testator made a subsequent will and appointed another executor.<sup>5</sup> Neither can it be collaterally impeached on any other ground,<sup>6</sup> nor set aside by a proceeding in chancery.<sup>7</sup> The probate of a will establishes its *status*; and the *status* thus estab-

<sup>1</sup> *Magee v. Beirne*, 39 Pa. St. 50; *Drake on Attachment*, sec. 5; 2 *Smith's Lead. Cas.*, 7th ed., 809; *Cooper v. Reynolds*, 10 Wall. 308; *Maxwell v. Stewart*, 22 Wall. 77.

<sup>2</sup> 2 *Smith's Lead. Cas.*, 6th Am. ed., 669; *Noel v. Wells*, 1 Lev. 235; *Allen v. Dundas*, 3 Term Rep. 125; *Fry v. Taylor*, 1 Head, 594; *Archer v. Mosse*, 2 Vern. 8; *Gingell v. Horne*, 9 Sim. 539; *Holliday v. Ward*, 19 Pa. St. 485; 57 Am. Dec. 671; *Schultz v. Schultz*, 10 Gratt. 358; 60 Am. Dec. 335; *Nowell v. Leasneur*, 33 Gratt. 222; *Steele v. Renn*, 50 Tex. 467; 82 Am. Dec. 605; *Moore v. Tanner's Adm'r*, 5 T. B. Mon. 42; 27 Am. Dec. 35; *Cecil*

*v. Cecil*, 19 Md. 72; 81 Am. Dec. 626.

<sup>3</sup> *Patton v. Allison*, 7 Humph. 320; *Miller v. Foster*, 76 Tex. 479.

<sup>4</sup> *Brown v. Brown*, 86 Tenn. 277.

<sup>5</sup> *Moore v. Tanner's Adm'r*, 5 T. B. Mon. 42; 27 Am. Dec. 35.

<sup>6</sup> *Vanderpool v. Van Valkenburgh*, 6 N. Y. 190.

<sup>7</sup> *Colton v. Ross*, 2 Paige, 396; 22 Am. Dec. 648; *State v. McGlynn*, 20 Cal. 233; 81 Am. Dec. 118; *Kerrick v. Bransby*, 7 Brown Cas. 437; *Jones v. Jones*, 7 Price, 663; *Jones v. Frost*, Jacob, 466; *Pemberton v. Pemberton*, 13 Ves. 290; *Adams v. De Cook*, 1 McAll. 253.

lished adheres to the will "as a fixture, and the judgment or decree in the premises, unless avoided in some mode prescribed by law, binds and concludes the whole world."<sup>1</sup> "If probate is granted of a will, then that conclusively establishes, in all courts, that the will was executed according to the law of the country where the testator was domiciled."<sup>2</sup> "Of course, such probate does not touch the question of the application of the will to real estate, unless the will be executed and recorded according to the *lex rei sitæ*."<sup>3</sup>

§ 609. **Decrees of Sale.**—In decreeing the sale of the real estate of a lunatic or of a deceased person, the court may also act *in rem*. If a judgment is entered against a lunatic after such decree, under which his property is sold, the purchaser can acquire nothing at the sale, as against a person claiming under the decree. It is impossible for the subsequent lien-holder to defeat the orders of the court in regard to real estate subject to its power.<sup>4</sup>

§ 610. **Marriage and Divorce.**—"A sentence in a matrimonial suit is conclusive, for it is an adjudication upon the *status* of the parties."<sup>5</sup> But it is otherwise when the suit is for a jactitation of marriage, for there the spiritual court does not intend to affect the *status* of the parties by its decree, but merely to prevent one party from falsely asserting that a marriage happened under certain specified circumstances."<sup>6</sup> A decree of divorce, when the court has jurisdiction of the parties and of the subject-matter,

<sup>1</sup> *Derland v. Harrington's Heirs*, 29 Ala. 95; *Woodruff v. Taylor*, 20 Vt. 65; *Ballou v. Hudson*, 13 Gratt. 682; *State v. McGlynn*, 20 Cal. 233; 81 Am. Dec. 118.

<sup>2</sup> *Whicker v. Hume*, 7 H. L. Cas. 124.

<sup>3</sup> *Wharton's Conflict of Laws*, sec. 645; *Story's Conflict of Laws*, sec. 474; *Robertson v. Barbour*, 6 Mon. 523; *Jones v. Robinson*, 17 Ohio St. 171; *Kerr v. Moore*, 9 Wheat. 565.

<sup>4</sup> *Latham v. Wiswall*, 2 Ired. Eq.

294; *Wyman v. Campbell*, 6 Port. 219; 31 Am. Dec. 677. See also *Jeter v. Hewett*, 22 How. 352.

<sup>5</sup> 2 *Smith's Lead. Cas.*, 6th Am. ed., 670; citing *Da Costa v. Villa Real*, *Strange*, 691; *Bunting's Case*, 4 Coke, 29; *Kenn's Case*, 7 Coke, 42; *Meddowcroft v. Huguenin*, 4 Moore, 386; *Perry v. Meddowcroft*, 10 Beav. 122; *Hood v. Hood*, 110 Mass. 463; *Smith v. Smith*, 13 Gray, 209.

<sup>6</sup> 2 *Smith's Lead. Cas.* 670.

is doubtless binding upon them; and because it destroys their marital obligations, and frees them from the contract of marriage, establishes for them the *status* of unmarried persons. To accomplish this result it is not necessary that it be regarded as *in rem*. In fact, it is *in personam* only, because it acts solely upon personal rights and obligations, and cannot properly be pronounced unless the court obtains jurisdiction over the persons divorced in some mode sanctioned by law. But there is no *res* against which the court does or can proceed, and therefore the judgment, unless it is valid as a judgment against and between persons, is not valid at all. The marriage relation in some countries, as, for instance, in England until the establishment of the divorce court in 1858, could not be destroyed by the courts of the country wherein it was created, nor would the courts of that country recognize the power of any other courts to annul marital obligations contracted in England between natives thereof. A foreign divorce, therefore, had no effect either *in rem* or *in personam*, if the parties were residents of England married therein.<sup>1</sup> It is still clear that "in no case has a foreign divorce been held to invalidate an English marriage between English subjects, where the parties were not domiciled in the country by the tribunals of which the divorce was granted."<sup>2</sup> The extraterritorial effect of divorces granted in the state courts of the United States has already been considered in the chapter on judgments in the sister states.<sup>3</sup>

§ 611. **Jurisdiction.** — In treating of judgments *in personam*, we found that the first and most material inquiry in regard to an apparent *record* was in reference to the jurisdiction of the court from which the record was produced; that the first jurisdictional inquiry was, whether

<sup>1</sup> *McCarthy v. Decaix*, 2 Russ. & M. J., N. S., 81; *Shaw v. Gould*, 3 H. L. Cas. 56; *Robins v. Dolphin*, 1 Swab. & T. 37; affirmed, 7 H. L. Cas. 300.

<sup>2</sup> *Shaw v. Attorney-General*, 39 L.

<sup>3</sup> See *ante*, secs. 579-584.

the court had authority over the subject-matter, and the second was, whether it had authority over the parties. A judgment *in rem*, at least when against any *thing*, binds the "*res*, in the absence of any personal notice to the parties interested."<sup>1</sup> Those parties, even in the absence of personal notice, are to be regarded as parties to the suit.<sup>2</sup> It is more accurate to say that the parties in interest are bound by the judgment, though they have no *actual* notice. The mere seizure of property does not confer jurisdiction upon the court to proceed to judgment. "A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will therefore operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is, not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable."<sup>3</sup> It is

<sup>1</sup> The Globe, 2 Blatchf. 427.

<sup>2</sup> Windsor v. McVeigh, 93 U. S. 279;

<sup>3</sup> Bauduc's Syndics v. Nicholson, 4 Bradstreet v. Neptune I. Co., 3 Sum. Miller (La.) 81; Thomas v. Southard, 601; Hamall v. Wilcox, 130 U. S. 2 Dana, 475; Burn v. Bletcher, 23 493.  
U. C. Q. B. 36.

further essential that the court have jurisdiction over the subject-matter; and whether it has such jurisdiction must, as in the case of judgments *in personam*, be determined by the laws creating the court and designating its general authority; or if the court acted under some special statutory authority, the statute conferring it must be examined to ascertain whether and to what extent the court was authorized to act. Thus if proceedings *in rem* are authorized to condemn the estates and interests of certain designated classes of persons engaged in rebellion against the government, and property is seized and condemned in which they have no interest, but which belonged to other persons, the judgment is ineffectual, because the property of such other persons was not a subject-matter within the jurisdiction of the court.<sup>1</sup>

§ 612. **How Avoided, if from Foreign Court.**—In considering a judgment *in rem* pronounced in some foreign country, the inquiry is, not whether the defendant was summoned or whether he appeared in the suit; “the question is, Did the *forum rei sitæ* proceed according to its own municipal laws, in pronouncing such judgment or decree?” The effect of the judgment or decree may be avoided by showing that it is void on its face, or void by the local law, *fori rei judicatæ*. It may be shown that the notice required by law was not given. But errors of law appearing on the face of the proceedings will not be considered, for their consideration involves the exercise of appellate jurisdiction.<sup>2</sup>

#### PART II.—OF JUDGMENTS AND DECREES IN ADMIRALTY.

§ 613. **General Nature of.**—Courts of admiralty are spoken of as courts held under the law of nations. To the proceedings of these courts, all persons having any interest in the subject-matter of the suit are regarded as

<sup>1</sup> *Day v. Micon*, 18 Wall. 156; *Risley* Wall. 163; *Bigelow v. Forest*, 9 Wall. 351.  
<sup>2</sup> *Phoenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421; *Ex parte Lange*, 18

<sup>3</sup> *Moore v. Douglas*, 4 Sand. Ch. 184.

parties, and are allowed to appear and contest the rights of the libellant.<sup>1</sup> Especially in proceedings in the exercise of their jurisdiction over questions of prize do these courts act under and in accordance with the law of nations. And as each judgment is binding and conclusive throughout the jurisdiction in which it is pronounced, the judgments determining questions of prize must be recognized and enforced in all countries where the law of nations under which the prize court acted is acknowledged and respected.<sup>2</sup> This general respect of the decisions of admiralty courts was, no doubt, engendered by considerations of the uncertainty, hardship, and inconvenience which were sure to result unless those decisions were conclusive in all countries. The subject-matter of the decisions being vessels intended for the purposes of commerce in all parts of the world, it is obvious that unless the decisions were binding everywhere, no one would dare to navigate any vessel beyond the jurisdiction of the nation in whose courts the title to such vessel had been divested from one person and vested in another. In an early English case, the judge, in holding the sentence of a foreign court in admiralty conclusive, ironically remarked "that otherwise merchants would be in a *pleasant* condition."<sup>3</sup> And an early American case expressed the same idea in a different and better form, when, in speaking of a court of admiralty, it is said: "If its decree were not binding on all the world upon the points which it professes to decide, the consequences would be most mischievous to the public."<sup>4</sup> The law in reference to condemnations in admiralty "appears to me to rest upon three very obvious considerations: the propriety of leaving the cognizance of prize cases exclusively to courts of

<sup>1</sup> *Armroyd v. Williams*, 2 Wash. Francis, 2 Wend. 64; 19 Am. Dec. C. C. 508. 549; *Walton v. Bethune*, 2 Brev. 453;

<sup>2</sup> *Brown v. Union Ins. Co.*, 4 Day, 4 Am. Dec. 597; *The Rio Grande*, 23 179; 4 Am. Dec. 204; *The Helena*, 4 Wall. 465; *Street v. Augusta I. & B. Co.*, 12 Rich. 13; 75 Am. Dec. 714.

<sup>3</sup> *Hughes v. Cornelius*, 2 Show. 232. 4 Q. B. 676; *Armroyd v. Williams*, 2 Wash. C. C. 506; *Ocean Ins. Co. v.*

<sup>4</sup> *Gelston v. Hoyt*, 3 Wheat. 246.



prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in the courts of common law; and the impropriety of revising the decisions of maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world."<sup>1</sup>

§ 614. **Jurisdiction.** — A sentence of a court of admiralty professing to proceed *in rem* is liable to be avoided upon showing that the tribunal had no jurisdiction over the *res* against which it proceeded, or that by the law of its creation it had no authority to determine the questions on whose determination the sentence is founded. Chief Justice Marshall considered and decided this question in an opinion pronounced by him in 1808, in which he said: "Can this court examine the jurisdiction of a foreign tribunal? The court pronouncing sentence, of necessity, decided in favor of its jurisdiction, and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country. This proposition certainly cannot be admitted to its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject which it had decided, could have no legal effect whatever. The power of the court, then, is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the rights of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered. But although the general power by which a court takes its jurisdiction, of necessity, must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty whether the

<sup>1</sup> *Croudson v. Leonard*, 4 *Cranoh*, 434.

situation of the particular thing on which the sentence is passed may be inquired into, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing sentence. For example, in every case of a foreign sentence condemning a vessel as a prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question whether the vessel condemned was in a situation to subject her to the jurisdiction of that court also examinable? This question, in the opinion of the court, must be answered in the affirmative. Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that the condemnation operated as a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."<sup>1</sup>

A prize court has no authority to "sit in the dominions of a neutral power. 'Its doing so,' as Sir William Scott observed, in the celebrated case of *The Flad Oyen*, 8 Term Rep. 270, note, 'is a licentious attempt to exercise the rights of war in the bosom of a neutral country.' Accordingly, to the sentence of such a tribunal our courts attribute no credit or authority whatever."<sup>2</sup> A foreign court acting

<sup>1</sup> *Rose v. Himely*, 4 Cranch, 241, 8 Term Rep. 276; *Donaldson v. 269*; *Cheriot v. Foussat*, 3 Binn. Thompson, 1 Camp, 429; *Oddy v. 220*.

<sup>2</sup> 2 Smith's Lead. Cas., 6th Am. ed., Bovill, 7 Term Rep. 523; *Wheelwright v. Depeyster*, 1 Johns. 431, 683; citing *Havelock v. Rockwood*, 3 Am. Dec. 345.

under the authority of those in whom the power of the country is for the time being vested must be deemed to have the jurisdiction of a legitimate court.<sup>1</sup> A judgment of a *de facto* court of a foreign nation must doubtless be respected. Nevertheless, when a foreign judgment *in rem* in admiralty is relied upon, its jurisdiction, though probably presumed, is always open to inquiry, and if it was not authorized to act, its judgment is inoperative.<sup>2</sup>

§ 615. **Effect as Res Judicata.**—Decisions of admiralty courts proceeding *in rem* derive additional importance from the fact that, besides determining the rights of property in the thing seized and adjudicated upon, they also conclusively establish, even as against others than the owners and libelants, the facts distinctly found by the court and necessary to sustain the sentence. "The decree will be conclusive upon the question as well as the thing, and cannot be contradicted in any subsequent controversy with reference to the same property, although between persons who were not parties to the decision, and founded on a contract anterior to the period at which it was made."<sup>3</sup> A condemnation of a vessel or its cargo as the property of an enemy,<sup>4</sup> or because the vessel was engaged in the transportation of merchandise into an enemy's country,<sup>5</sup> is conclusive in a subsequent action between the owners and the insurers that the vessel was not a neutral, as it was warranted to be, or that it had falsified the warranty by which the insurer was protected from loss from illicit trade. A decree condemning a vessel for a breach of a blockade, or for a violation of revenue laws, is conclusive evidence of such breach or violation

<sup>1</sup> *Bank of N. A. v. McCall*, 4 Binn. 371.

<sup>2</sup> *Ouculla v. La. Ins. Co.*, 5 Martin, N. S., 464; 16 Am. Dec. 199; *The Griefswald*, Swab. 430; *Snell v. Faussett*, 1 Wash. C. C. 271.

<sup>3</sup> 2 Smith's Lead. Cas., 6th Am. ed., 836. A decree that a vessel libeled is a foreign vessel is conclusive of its

foreign character: *The Rio Grande*, 23 Wall. 466.

<sup>4</sup> *Walton v. Bethune*, 2 Brev. 493; 4 Am. Dec. 597; *Brown v. Union Ins. Co.*, 4 Day, 179; 4 Am. Dec. 204; *Blanche v. Peytavin*, 4 Mart. (La.) 458; 6 Am. Dec. 705.

<sup>5</sup> *Ouculla v. La. Ins. Co.*, 5 Martin, N. S., 464; 16 Am. Dec. 199.

in any subsequent controversy between the owner of the vessel and its insurers.<sup>1</sup> The same effect belongs to a decree resulting from a proceeding *in rem* in an admiralty court for damages done by one vessel to another at sea.<sup>2</sup> If a vessel is cast on shore and abandoned, and an officer or public agent of the country in which the vessel is, acting under authority of the local law, takes possession of and sells it, a good title passes. Every government has the right to prescribe "its own rules relative to wrecks and property left derelict," and "a sale according to the law of the place where the property is must vest a title in the purchaser, which all foreign courts are bound, not only from comity, but on strong grounds of public utility, to recognize."<sup>3</sup> But the jurisdiction of courts of admiralty to make adjudications binding against persons not parties to the proceedings, may be limited by stipulation. A policy of insurance written in Philadelphia contained a warranty by the assured that the goods insured were "*American* property, to be proved, if required, in this city, and not elsewhere." These goods were condemned as enemy's property in a foreign court of admiralty, but the assured was held not to be bound by the decree of condemnation.<sup>4</sup> The courts of New York and Virginia, while they concede that a judgment *in rem* condemning a vessel or its cargo operates as against all persons so far as to change the title to the property, deny that it conclusively establishes the grounds of condemnation in other actions or proceedings, and affirm that the owner may still, as against the insurer or other persons with whom the question may be material, prove that the grounds

<sup>1</sup> *Groning v. Union Ins. Co.*, 1 Nott & McC. 537; *Crounson v. Leonard*, 4 Cranch, 434; *Bradstreet v. Neptune Ins. Co.*, 3 Sum. 600; *Baxter v. N. E. Marine Ins. Co.*, 6 Mass. 277; 4 Am. Dec. 125; *Ludlow v. Dale*, 1 Johns. Cas. 16; *Whitney v. Walsh*, 1 Cosh. 29; 48 Am. Dec. 590; *Lothian v. Henderson*, 3 Bos. & P. 499; *Bolton v. Gladstone*, 5 East, 155.

<sup>2</sup> *Street v. Augusta Ins. Co.*, 12 Rich. 13; 75 Am. Dec. 714; *Magoun v. New Eng. Ins. Co.*, 1 Story, 157; *The Propeller East*, 9 Ben. 76; *Harmer v. Ball*, 7 Moore P. C. 267; *Providence W. I. Co. v. Morse*, 35 Fed. Rep. 363.

<sup>3</sup> *Grant v. McLaohlin*, 4 Johns. 34.

<sup>4</sup> *Calhoun v. Ins. Co.*, 1 Binn. 293.

upon which the condemnation rested did not in fact exist.<sup>1</sup> The general rule that a judgment and the findings and decision on which it is based cannot be conclusive against the parties with reference to incidental, collateral, or immaterial matters, however distinctly or emphatically they may be affirmed by the judgment, verdict, or findings, is especially applicable to judgments of courts of admiralty and other courts proceeding *in rem*, when their judgments are relied upon not merely as muniments of title, but as conclusive upon questions of fact in other proceedings and controversies.<sup>2</sup>

§ 616. **Sentence of Acquittal as Res Judicata.**—No distinction exists between a sentence of condemnation and a sentence of acquittal in regard to the principle of *res judicata*. The latter is as conclusive on all persons that the alleged ground of condemnation does not exist, as the former is that it did exist.<sup>3</sup>

§ 617. **Effect as Res Judicata Confined to Parties in Interest.**—Notwithstanding the frequency with which it has been stated, in general terms, that a judgment *in rem* is conclusive on the whole world, this conclusion must, it seems, be confined to those persons who, from their interest in the subject of the proceeding *in rem*, were entitled to appear in such proceeding and assert their interest in the thing condemned. In the year 1813, during the war between Great Britain and the United States, the brig *Mary* was captured by an American privateer and brought into an American port, where "the vessel and cargo were libeled as enemy's property." No claim being made in behalf of the owners of the vessel, she was condemned. The cargo

<sup>1</sup> *Francis v. Ocean Ins. Co.*, 6 Cow. 404; affirmed, *Ocean Ins. Co. v. Francis*, 2 Wend. 64; 19 Am. Dec. 549; *Vandenheuvel v. United Ins. Co.*, 2 Johns. Cas. 450; 1 Am. Dec. 180; *Bourke v. Granberry*, Gilmer, 16; 9 Am. Dec. 589.

<sup>2</sup> *Fittsimmons v. Newport Ins. Co.*, 4 Cranch, 185; *Maley v. Shattuck*, 3

*Cranch*, 458; *Van Vechten v. Griffith*, 1 Keyes, 104; 4 Abb. App. 487; *Colvert v. Bovill*, 7 Term Rep. 523; *Christie v. Secretan*, 8 Term Rep. 192; *Andrews v. Brown*, 3 Cosh. 130.

<sup>3</sup> *Gelston v. Hoyt*, 13 Johns. 561; also same case in 3 Wheat. 248, 318; *Williams v. Armroyd*, 7 Cranch, 423.

was claimed by one Visscher for himself and others; and the sentence of condemnation against the *Mary* was relied upon by her captors as establishing, as against the claimants of the cargo, that the brig was enemy's property. Chief Justice Marshall delivered the opinion of the court, denying the claim of the captors. He argued that as the claim to the vessel and the claim to her cargo were distinct claims held by different persons, the failure to assert one ought not to prejudice the assertion of the other; that the owners of the cargo, not having any interest in the vessel, could not appear for her nor conduct any proceedings in her behalf tending to show that she was American property. In the course of his opinion he said: "This case is to be distinguished from those which have been decided on policies of insurance, not only by the circumstance that the cause respecting the vessel and her cargo came on at the same time before the same court, but by the differences in reason and in law, which appear to be essential. The decisions of a court of exclusive jurisdiction are necessarily conclusive on all other courts, because the subject-matter is not examinable in them. With respect to itself, no reason is perceived for yielding to them a further conclusiveness than is allowed to the judgments and decrees of common law and equity. They bind the subject-matter, as between parties and privies. The whole world, it is said, are parties in an admiralty cause, and therefore the whole world is bound by the decision. The reason on which the *dictum* stands will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary, in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual can be bound by a judicial sentence, he shall have notice, either actual or constructive, of the proceedings against him. Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served

on the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the Mary has constructive notice of her seizure, and may fairly be considered a party to the libel. But those who have no interest in the vessel, which could be asserted in the court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties in the cause, so far as respects the vessel. When such person is brought before a court in which the fact is examinable, no sufficient reason is perceived for precluding him from re-examining it. The judgment of a court of common law, or the decree of a court of equity, would, under such circumstances, be re-examinable in a court of common law or a court of equity; and no reason is discerned why the sentence of a court of admiralty, under the same circumstances, should not be re-examinable in a court of admiralty.”<sup>1</sup>

§ 618. **The Grounds of the Sentence must Appear.**—No doubt a decree *in rem* pronounced in an admiralty court is not conclusive of any fact not necessary to support it,<sup>2</sup> and it is very questionable whether it is conclusive in regard to those facts, unless it professes to have determined them, and sets them up as the ground of its decision. Lord Mansfield was of the opinion that if a vessel were condemned *as good and lawful prize*, and no ground for such condemnation were specified, it must be presumed to have been on the ground that the vessel was enemy's property.<sup>3</sup> But this opinion of his lordship's is greatly shaken, if not entirely overthrown, both in England and in the United States. As there are other sufficient causes

<sup>1</sup> *The Mary*, 9 Cranch, 126.

<sup>2</sup> 3 Doug. 345. See also *Barring v. Clag-*

<sup>3</sup> *Malay v. Shattuck*, 3 Cranch, 458. *ett*, 3 Bos. & P. 215; *Campbell v. Wil-*

<sup>4</sup> *Saloucci v. Woodmass*, Park. 352; *Hamson*, 2 Bay, 237.

for condemning a vessel besides that of its being an enemy's property, there is no reason why every condemnation should be presumed to be based on that ground because no other ground appears.<sup>1</sup>

A case came before the supreme court of the United States, involving the effect of a sentence condemning an American ship as *lawful prize*. The court held that the condemnation did not show any violation of the neutrality laws, and that it was open to the plaintiffs to show that the vessel had behaved as an American and not as an enemy's ship.<sup>2</sup> If a sentence of condemnation is shown to be based either on the ground that the vessel was an enemy's property, or that it had violated some law of regulation of the country where it was condemned, the sentence of condemnation is not evidence of a breach of the warranty of neutrality.<sup>3</sup> If a decree of condemnation states a particular ground, and then condemns the vessel on account of such ground, or otherwise, the addition of the words or otherwise renders the grounds of the decree uncertain, and prevents it from being conclusive on the ground mentioned.<sup>4</sup> But if a decree professes to proceed for a specified cause, and for other sufficient causes, it is conclusive of the existence of the cause specified.<sup>5</sup>

"The sentence of a foreign court of admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, when such fact appears, on the face of the sentence, free from doubt and ambiguity. But it is at the same time well established that, in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must clearly appear on the face of the sentence; it must not be collected by inference only, or left in uncertainty, whether the ship

<sup>1</sup> *Dalgleish v. Hodgson*, 7 Bing. 504; *Fisher v. Ogle*, 1 Camp. 418; *Bailey v. South Carolina Ins. Co.*, 1 Nott & McC. 541; *Goix v. Low*, 2 Johns. Cas. 480.

<sup>2</sup> *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch, 185.

<sup>3</sup> *Bernardi v. Motteaux*, 2 Doug. 575; *Lothian v. Henderson*, 3 Bos. & P. 528.

<sup>4</sup> *Robinson v. Jones*, 8 Mass. 536; 5 Am. Dec. 114.

<sup>5</sup> *Baxter v. New England Marine Ins. Co.*, 6 Mass. 277; 4 Am. Dec. 128.



was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country."<sup>1</sup> Whenever a decree is ambiguous, and does not show clearly that it is based on some specified ground, it is not conclusive upon any ground, and the parties in interest are at liberty to show by any competent evidence the *status* of the vessel at the time of her condemnation.<sup>2</sup>

§ 618 a. *Impeaching.* — A judgment of a foreign court of admiralty acting *in rem* cannot be impeached for mere errors in its proceedings, nor because of mistakes or errors either regarding the local law or that of a foreign nation.<sup>3</sup> Whether fraud in the procurement of the judgment may be asserted, and its effect thereby avoided collaterally, is a question which has been but little considered. In an early American case this question was determined in the negative, but the exceeding brevity of the opinion indicates that but slight examination or reflection preceded it,<sup>4</sup> while the English decisions, supposed to support an opposite conclusion, are as to this point mere *dicta*.<sup>5</sup>

<sup>1</sup> *Dalgleish v. Hodgson*, 7 Bing. 495; *Hobs v. Henning*, 17 Com. B., N. S., 791. Q. B. 163; *Williams v. Armroyd*, 7 Cranch, 423.

<sup>2</sup> *Vasse v. Ball*, 2 Dall. 270; *Blacklock v. Stewart*, 2 Bay, 363; *Williamson v. Fitzsimmons*, 2 Bay, 388; *Gray v. Swan*, 1 Harr. & J. 142. <sup>3</sup> *Stewart v. Warner*, 1 Day, 142; 2 Am. Dec. 61.

<sup>4</sup> *Goddard v. Gray*, L. R. 6 Q. B. 139; *Messina v. Petrocochino*, L. R. 4 P. C. 144; *Shand v. Du Boisson*, L. R. 18 Eq. 283; *Story's Conflict of Laws*, sec. 592.

<sup>5</sup> *Castrique v. Imrie*, L. R. 4 H. L. 414; *Castrique v. Behrens*, 30 L. J.

## CHAPTER XXIX.

## ATTACKS ON JUDGMENTS BY HABEAS CORPUS.

- § 619. General conclusiveness of judgment under which the prisoner is held.
- § 620. *Habeas corpus* does not review mere errors.
- § 621. *Habeas corpus* does not review mere irregularities.
- § 622. Insufficiency of the indictment or information.
- § 623. Want of jurisdiction over person or subject-matter.
- § 624. Convictions without authority of law.
- § 625. Sentences not warranted by law.
- § 626. Sentences for acts done or omitted in pursuance of constitution or laws of the United States.

§ 619. **General Conclusiveness of Judgment under Which the Prisoner is Held.**—The writ of *habeas corpus* usually issues in cases where no judgment has yet been entered, and where the object is to relieve from imprisonment persons against whom no charge warranting their arrest or detention has been made. But it sometimes appears from the return that the prisoner is held upon a commitment issued pursuant to the judgment of some court or judge. The prisoner or his counsel may then seek to attack or discredit this judgment, and the subject which we wish to consider in this chapter is the extent to which this attack may be carried. In the first place, we may remark that, so far as a judgment of conviction is questioned on *habeas corpus*, the attack is ordinarily a collateral one, and subject to the rules restricting collateral attacks.<sup>1</sup> In the supreme court of the United States, the writ may be issued in the exercise of appellate jurisdiction, and accompanied by a writ of *certiorari* to bring up the records and proceedings of an inferior court, but even here the court disclaims the right to review mere errors or to correct mere irregularities.<sup>2</sup> Where the attack

<sup>1</sup> *Turney v. Barr*, 75 Iowa, 758; *Ex parte Yenger*, 8 Wall. 85; *Ex parte Ah Men*, 77 Cal. 198; 11 Am. Siebold, 100 U. S. 374; *Ex parte Parks*, 93 U. S. 18; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Carll*, 106 U. S. 521.

<sup>2</sup> *Ex parte Virginia*, 100 U. S. 341;

is collateral, the judgment cannot be impeached for error<sup>1</sup> or irregularity,<sup>2</sup> except it be such as goes to the power of the court either to act in the case or to pass the sentence which it has given. The judgment may be disregarded for illegality and want of jurisdiction. Perhaps it would be more accurate to say for want of jurisdiction only; for the cases classed as illegalities merely present instances in which the court had either no jurisdiction to punish for the offense named, or else no power to punish in the manner shown by the sentence. Judgments are disregarded for want of jurisdiction when the court had no jurisdiction over the subject-matter or none over the person sentenced. They are usually said to be disregarded for illegality when it appears that the offense is not punishable by any law, or if so punishable, the sentence or judgment produced is not such as the court was empowered to render. There is also a class of cases, specified in section 753 of the Revised Statutes of the United States, in which the national courts are authorized to extend the writ of *habeas corpus* to persons confined for some act done or omitted pursuant to the constitution and laws of the United States, or the treaties made thereunder.<sup>3</sup> Many of the causes for which a judgment may be assailed on *habeas corpus* will appear from the return to the writ, or from the record in the case brought before the court by writ of *certiorari*, or put in evidence in support of some issue made or tendered to the return. The cases in which the attack may involve the examination of evidence *dehors* the record are doubtless limited and controlled by the rules applicable to collateral assaults on judgments in other cases. A prisoner cannot obtain his discharge upon *habeas corpus* when he is held under a commitment in due form issued upon a judgment, unless such judgment is void;<sup>4</sup> and it is not void because the

<sup>1</sup> *Post*, sec. 620, 622.

<sup>2</sup> *Post*, sec. 621.

<sup>3</sup> *Post*, sec. 626.

<sup>4</sup> *Ex parte Marx*, 86 Va. 40; *Ex*

*parte Rollins*, 80 Va. 314; *In re Coy*, 127 U. S. 757; *Ex parte Watkins*, 3 Pet. 202.

verdict on which it was based is defective,<sup>1</sup> nor because after the defendant pleaded guilty the court failed to call a jury, as required by statute, "to say, in their discretion, whether he should suffer the penalty of death or be imprisoned during life."<sup>2</sup> Whether the judgment under which the defendant is held was pronounced in a civil action, a criminal prosecution, or a special or summary proceeding, there can be no re-inquiry on *habeas corpus* respecting any issue of fact determined by it, or the verdict or the findings, express or implied, upon which it is based. Therefore, the defendant cannot urge as a ground of his discharge that the evidence against him was insufficient to justify his conviction;<sup>3</sup> or that the judgment was entered upon an obligation executed by another person having the same name as the defendant;<sup>4</sup> or that the facts recited in an order of commitment as constituting a contempt of court did not occur as therein stated;<sup>5</sup> or where defendant is committed for a failure to comply with an order of court, he having the ability so to do, that the evidence before the court committing him showed that he did not have such ability;<sup>6</sup> or that the prisoner, when sentenced to imprisonment in the house of correction, was more than twenty-five years of age, the judgment being silent respecting her age, but the sentencing court being under a duty to ascertain and determine her age before rendering judgment;<sup>7</sup> or was, on the other hand, when sentenced to the penitentiary, under the age of eighteen years, and therefore not liable to confinement in that prison.<sup>8</sup> As to jurisdictional questions, a judgment under which the prisoner is held is aided by the

<sup>1</sup> *Willis v. Bayles*, 105 Ind. 363; *Dover v. State*, 75 Ala. 40.

<sup>2</sup> *Lowery v. Howard*, 103 Ind. 440.

<sup>3</sup> *Turney v. Barr*, 75 Iowa, 758; *In re Bion*, 59 Conn. 372; *In re Wight*, 136 U. S. 136, 148; *Stevens v. Fuller*, 136 U. S. 468; *Ex parte Marx*, 86 Va. 40.

<sup>4</sup> *Gorman's Case*, 124 Mass. 190; 6 Cent. L. J. 365.

<sup>5</sup> *Ex parte Terry*, 128 U. S. 289; *State v. Woodfin*, 5 Ired. 199; 42 Am. Dec. 161; *Whittem v. State*, 36 Ind. 311.

<sup>6</sup> *In re Spencer*, 83 Cal. 460; 17 Am. St. Rep. 286; *People v. Foster*, 104 Ill. 156; *Ex parte Cottrell*, 59 Cal. 420; *Ex parte Cohn*, 55 Cal. 193.

<sup>7</sup> *Ex parte Williams*, 87 Cal. 78.

<sup>8</sup> *Ex parte Kaufman*, 73 Mo. 588.

same presumptions as in other cases of collateral assault. If the record is silent as to jurisdictional facts, jurisdiction is presumed.<sup>1</sup> Any irregularity in the service of process or in making the arrest is immaterial.<sup>2</sup> "After final judgment of conviction, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it; and this is true even though the prisoner had been kidnaped and forcibly brought before the court from a foreign jurisdiction."<sup>3</sup> If it appears that the jurisdiction of the court depended upon a litigated fact which it adjudged to exist, this adjudication is conclusive upon *habeas corpus* as well as in all other collateral proceedings.<sup>4</sup>

§ 620. The Writ of Habeas Corpus is not a Writ of Error, nor does it, except when perverted, discharge the functions of a writ of error. It is therefore no ground for the release of a prisoner that some error or irregularity has occurred in the course of the proceedings at or anterior to the trial, which, if presented to an appellate court by way of appeal or writ of error, must necessarily result in the reversal of the judgment.<sup>5</sup> Thus if the point made against the judgment is one which was or might have been urged upon demurrer to the indictment or

<sup>1</sup> *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263.

<sup>2</sup> *Ex parte McGill*, 6 Tex. App. 498; *Ex parte Kellogg*, 6 Vt. 511; *Owens v. Gotzain*, 4 Dill. 438.

<sup>3</sup> *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; *People v. Rowe*, 4 Park. Cr. 253; *United States v. Laurence*, 13 Blatchf. 306; *State v. Ross*, 21 Iowa, 467; *Mahon v. Justice*, 127 U. S. 700.

<sup>4</sup> *Ex parte Sternea*, 77 Cal. 156; 11 Am. St. Rep. 251.

<sup>5</sup> *Ex parte Siebold*, 100 U. S. 371; *In re Schenck*, 74 N. C. 607; *Ex parte Max*, 44 Cal. 32; *State v. Fenderson*, 28 La. Ann. 82; *Ex parte Hartman*, 44 Cal. 579; *Ex parte Sam*, 51 Ala. 34; *Ex parte Winston*, 9 Nev. 71; *Ex*

*parte Parks*, 93 U. S. 18; *Petition of Phinney*, 32 Me. 440; *Ex parte Granice*, 51 Cal. 375; *People v. McLeod*, 1 Hill, 377; 37 Am. Dec. 328; *O'Malley v. Wentworth*, 65 Me. 129; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Reed*, 100 U. S. 13; *Ex parte Toney*, 11 Mo. 661; *Williamson's Case*, 26 Pa. St. 9; 67 Am. Dec. 374; *In re Blair*, 4 Wis. 522; *Ex parte Bigelow*, 113 U. S. 328; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Gibson*, 31 Cal. 619; 91 Am. Dec. 546; *In re Petty*, 22 Kan. 477; *Ex parte Morris*, 30 Kan. 28; 7 Am. St. Rep. 512; *In re Grimley*, 137 U. S. 147; *Ex parte Shaw*, 7 Ohio St. 81; 70 Am. Dec. 55; *Wright v. Wright*, 74 Wis. 439; *Ex parte Thompson*, 93 Ill. 89.

complaint,<sup>1</sup> or by motion in arrest of judgment, the decision of the lower court, while it may be erroneous, is not void, and the judgment cannot be treated as a nullity.<sup>2</sup> Hence a judgment of conviction cannot be avoided on *habeas corpus* by proving that the defendant was denied a jury trial in a mayor's or other inferior court;<sup>3</sup> or that the jury returned a sealed verdict, upon which judgment was rendered;<sup>4</sup> or that the defendant was convicted for doing an act which he was authorized to do by a valid municipal ordinance;<sup>5</sup> or that the verdict was received and the jury discharged during his enforced absence in jail;<sup>6</sup> or that the verdict of the jury is not consistent in its findings, and the court ought not to have pronounced judgment thereon;<sup>7</sup> or that the court erroneously refused to receive evidence which, if received, must have resulted in defendant's acquittal;<sup>8</sup> or that an alien was permitted to sit on the jury, and the petitioner was denied his right to have compulsory process for obtaining witnesses in his favor;<sup>9</sup> or that the judge erred in deciding that a second indictment against a defendant was for the same cause as the first;<sup>10</sup> or that the defendant was convicted in a state court under one indictment of illegal voting, "both for a representative in Congress and for Presidential electors," when such court had no power to punish fraudulent voting for representatives in Congress;<sup>11</sup> or that the statutes of the state under which the conviction was had excluded persons of African descent from serving as grand or petit jurors;<sup>12</sup> or that the defendant was not informed of all his rights, or that six hours did not elapse after his conviction before his sentence;<sup>13</sup> or that the court erred in

<sup>1</sup> *Ex parte Fil Ki*, 79 Cal. 584; *McLaughlin v. Etchison*, 127 Ind. 474; 22 Am. St. Rep. 653; *Matter of Eaton*, 27 Mich. 1; *Prohibitory Amendment Cases*, 24 Kan. 700; *post*, sec. 622.

<sup>2</sup> *Ex parte Shaffenburgh*, 4 Dill. 271.

<sup>3</sup> *Ex parte Miller*, 82 Cal. 450; *Ex parte Brandon*, 49 Ark. 143. *Contra*, *In re Rolfs*, 30 Kan. 758.

<sup>4</sup> *State v. Orton*, 67 Iowa, 554.

<sup>5</sup> *Ex parte Lehmkuhl*, 72 Cal. 53.

<sup>6</sup> *Ex parte Farnham*, 3 Col. 545.

<sup>7</sup> *Kirby v. State*, 62 Ala. 51.

<sup>8</sup> *People v. Foster*, 104 Ill. 156.

<sup>9</sup> *Ex parte Harding*, 120 U. S. 782.

<sup>10</sup> *Ex parte Clay*, 98 Mo. 578.

<sup>11</sup> *In re Green*, 134 U. S. 377.

<sup>12</sup> *In re Wood*, 140 U. S. 278; *In re Jugiro*, 140 U. S. 291.

<sup>13</sup> *Ex parte Ah Sam*, 83 Cal. 620.

deciding that the "local option law," under which the defendant had been convicted, had been adopted in the county.<sup>1</sup> The evidence before the lower court will not be considered for the purpose of determining whether a matter of defense was so proved that the defendant ought to have been acquitted.<sup>2</sup> When the prisoner has been committed for contempt, "it is quite clear that the judge has no authority to inquire into the truth of the fact adjudged by the committing magistrate, to wit, that the prisoner was in contempt for not answering a question put to him when giving his evidence; nor can he inquire whether the question was a proper one, or whether the prisoner was privileged from answering it."<sup>3</sup> It must, however, be remembered that the errors against which relief cannot be had upon *habeas corpus* are errors in the exercise of the powers of the court, and not errors in determining that it had power to proceed when such power did not exist, or in determining something to be a crime which no valid law had made criminal, or in making some order or pronouncing some sentence which it had no power to make or pronounce.<sup>4</sup>

§ 621. Irregularities in the Proceedings anterior to the judgment do not justify the court in disregarding it or limiting its effect.<sup>5</sup> "An irregularity is a disregard of some prescribed rule or mode of proceeding, and consists either in omitting to do something necessary to the due and orderly prosecution of the cause, or in doing it at an unseasonable time or in an improper manner."<sup>6</sup> A defendant is not entitled to be discharged from custody on the ground that he was not examined nor held to answer

<sup>1</sup> *Ex parte Mitchell*, 104 Mo. 121.

<sup>2</sup> *Griffin v. State*, 5 Tex. App. 457; *Ex parte McCullough*, 35 Cal. 97; *Ex parte Bird*, 19 Cal. 130; *In re Bogart*, 2 Saw. 396.

<sup>3</sup> *People v. Cassels*, 5 Hill, 168; *State v. Towle*, 42 N. H. 540; *Williamson's Case*, 26 Pa. St. 9; 67 Am. Dec. 374; *Ex parte Goodin*, 18 Alb. L. J. 431.

<sup>4</sup> *Post*, secs. 624-626.

<sup>5</sup> *Ex parte McGill*, 6 Tex. App. 493; *Stewart's Case*, 1 Abb. Pr. 210; *People v. N. Y. Juv. Asylum*, 12 Abb. Pr. 92; *Bethell's Case*, Salk. 348; *Ex parte Van Hagan*, 25 Ohio St. 426; *People v. Cavanagh*, 2 Park. Cr. 650; *Ex parte Moan*, 65 Cal. 216.

<sup>6</sup> *Ex parte Schwartz*, 2 Tex. App. 74.

by a magistrate prior to the filing of the information under which he was convicted.<sup>1</sup> A judgment of conviction cannot be impeached on *habeas corpus* by showing that the indictment was not found by a grand jury,<sup>2</sup> or that the verdict was received or recorded in the absence of the defendant.<sup>3</sup> Nor can one imprisoned under execution in a civil case avoid the judgment and obtain his release by showing that the court erred in not sustaining a plea in abatement by which he sought to avail himself of an irregularity in the service of the summons.<sup>4</sup> A prisoner will not be discharged because his sentence was imposed without waiting the time required by law after receiving the verdict or plea of guilty,<sup>5</sup> nor because of any irregularity at the returning of the verdict, as where one of the officers required to be present was in fact absent.<sup>6</sup>

§ 622. *Insufficiency of the Indictment or Information.*—To judge of the sufficiency of the complaint, indictment, or information, and to determine whether the matters therein stated constitute a public offense, is certainly one of the duties intrusted to the court in which the conviction is had, and if it be true that *habeas corpus* cannot be used for the same purpose as a writ of error or an appeal, the decision of the trial court ought to be conclusive, and not subject to practical annulment because not in accord with the views of the court before which the writ of *habeas corpus* is returnable. Generally the courts have, on *habeas corpus* after conviction, refused to look into the indictment for the purpose of passing upon its sufficiency. Thus the supreme court of Michigan, when a petition was presented to it for a writ of *habeas corpus* to test the sufficiency of the information on which the conviction was had, denied the prayer of the petition, because to grant it "would be to make the writ of *habeas corpus* take the place

<sup>1</sup> *Ex parte McConnell*, 83 Cal. 558.

<sup>2</sup> *Ex parte Twobig*, 13 Nev. 302; *State v. Fenderson*, 23 La. Ann. 82.

<sup>3</sup> *Ex parte Farnham*, 3 Col. 545.

<sup>4</sup> *Ex parte Kellogg*, 6 Vt. 509.

<sup>5</sup> *Petition of Smith*, 2 Nev. 338.

<sup>6</sup> *Rex v. Carlisle*, 4 Car. & P. 415.



of a writ of error."<sup>1</sup> This ruling is in accord with that of the supreme courts of Mississippi<sup>2</sup> and Texas.<sup>3</sup> In Wisconsin, a prisoner brought before the supreme court on *habeas corpus* claimed his discharge on the ground that the information then pending against him did not charge him with a public offense, but the court refused to consider the question.<sup>4</sup> Substantially the same question has

<sup>1</sup> Matter of Eaton, 27 Mich. 1.

<sup>2</sup> Emanuel v. State, 36 Miss. 627.

<sup>3</sup> Parker v. State, 5 Tex. App. 579.

<sup>4</sup> Petition of Semler, 41 Wis. 517.

In this case, at page 523, the court said: "Another question arising in this case is, Can the petitioner be relieved by means of this writ? or must he resort to some other appropriate process to review and correct the proceedings of the circuit court? This leads to an inquiry as to the office of the writ, and what matters can be considered upon it. And at the outset it may be observed that the principle is well settled that a writ of *habeas corpus* does not have the scope, nor is it intended to perform the office, of a writ of error or appeal. This doctrine is almost elementary in the law. The writ, then, cannot be resorted to for the purpose of reviewing and correcting orders and judgments which are erroneous merely. It deals with more radical defects, which go to the jurisdiction of the court or officer, and which render the proceeding or judgment void. A distinction between a proceeding or judgment which is void, and one that is voidable only for error, is recognized in the cases, and must be observed. Says Dixon, C. J., in Petition of Crandall, 34 Wis. 177: 'It is conceded that for mere error, no matter how flagrant, the remedy is not by writ of *habeas corpus*. For error, the party imprisoned must prosecute his writ of error or *certiorari*. Nothing will be investigated on *habeas corpus* except jurisdictional defects, or illegality, as some courts and authors term it; by which is meant the want of any legal authority for the detention or imprisonment': Page 179. To the same effect is the doctrine laid down in *In re Blair*, 4 Wis. 522; *In re O'Connor*, 6 Wis. 288; *In re Perry*, 30 Wis. 268. Now, the inquiry is, in the light of these adjudications, Did the circuit

court act without jurisdiction, or in excess of its jurisdiction, in the matter complained of? or did it make merely a wrong decision? There can be no doubt that the circuit court had jurisdiction of the person of the petitioner, and of the offense charged in the information. But it is claimed that the first and second counts in the information charged no offense; in other words, that the information is insufficient, and that the motion to quash, for that reason, should be sustained. This may be at once conceded, but what follows? Manifestly this, that the circuit court gave a wrong decision, where it clearly had jurisdiction, in holding a defective information good. The court committed an error, but there is no ground for saying it acted without jurisdiction in rendering its decision. If a demurrer had been filed to the information, and overruled by the court, precisely the same question would have been presented. It is a case of error, for which the petitioner can only have relief on writ of error or some other appropriate process of review. He cannot have relief on a writ of *habeas corpus* without making such writ perform all the office of a writ of error. This seems very obvious. Nor does the fact that this court, under the constitution, has appellate jurisdiction over the circuit courts in any way affect the question before us. For this court can only exert revisory or appellate jurisdiction on proper process, proceeding according to the rules of law. It cannot overlook and disregard the well-established distinction between the scope and operation of a writ of error and a writ of *habeas corpus*, and make the latter a substitute for the former. And the distinction has been clearly recognized in the above decisions. In the case of *Hauser v. State of Wisconsin*, 33 Wis. 678, a strictly analogous question was con-

arisen in and been determined by the supreme court of the United States. The first case was that known as *Ex parte Watkins*, 3 Pet. 193. It was then claimed that the prisoner ought, after conviction in the circuit court, to be discharged "on the allegation that the indictment charges no offense for which the prisoner was punishable in that court, or of which that court could take cognizance, and consequently that the proceedings are *coram non judice*, and totally void." Chief Justice Marshall delivered the opinion of the court. He adverted to the fact that by no appellate proceeding could the judgment of the circuit court convicting and sentencing the prisoner be brought before the supreme court for review, and then proceeded as follows: "Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record

sidered. That was a *certiorari* to review the decision of the municipal court of Milwaukee refusing to quash a criminal information for a libel against a corporation. It was claimed that a corporation could not be the object of a criminal libel, and that the municipal court erred in holding the contrary. But this court held that even if that position was well taken, the real question presented to the municipal court for decision was, whether the information did or did not charge the accused with the commission of a criminal offense, and that this was in no sense a jurisdictional question. It refused to review the decision on the motion to quash upon *certiorari* and quash the writ. The operation of the writ of *certiorari* is certainly as extensive as the writ of *habeas corpus*; still, this court declined to examine on that writ the correctness of the ruling of the municipal court in refusing to quash. The reason and principle of that decision are directly applicable to the case at bar. So in *Ex parte Booth*, 3 Wis. 145, the petitioner applied to this court for a writ of *habeas corpus* to discharge him

from imprisonment. It appeared that he was in confinement by force of a warrant of the district court of the United States, and that the object of the imprisonment was to compel him to answer an indictment for a violation of the fugitive slave law. That law had been held to be unconstitutional by this court in a previous case. Whiton, C. J., says: 'These facts show that the district court of the United States has obtained jurisdiction of the case, and it is apparent that the indictment pending against the petitioner is for an offense of which the courts of the United States have exclusive jurisdiction. We do not see, therefore, how we can, consistently with the principles of our former decision, interfere': Page 148. The writ was denied. The petition before us shows that the applicant is committed on an order of the circuit court for want of bail. He is held by the process of a court of competent jurisdiction, which had authority to make the order. For these reasons, neither the sufficiency of that order nor the correctness of the decision on the motion to quash will now be inquired into."

whose jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to the inquiry concerning the fact by deciding it. The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced; but they deny their application to a case in which the indictment charges an offense not punishable criminally according to the law of the land. But with what propriety can this court look into the indictment? We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The circuit court for the District of Columbia is a court of record having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force, unless reversed regularly by a superior court capable of reversing it. If this judgment be obligatory, no court can look behind it. If it be a nullity, the officer who obeys it is guilty of false

imprisonment. Would the counsel for the prisoner attempt to maintain this position?"

After an extensive review of the authorities, the chief justice thus concluded: "Without looking into the indictments under which the prosecution against the prisoner was conducted, we are unanimously of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not to be awarded." So in a very recent case, the same court adhered to the spirit of its earlier decisions, saying: "Whether an act charged in an indictment is or is not a crime by the law which the court administers, is a question to be met at every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgments, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court."<sup>1</sup>

These cases, especially the one last cited, unquestionably affirm that one indicted and convicted in one of the national courts of an act, and sentenced to imprisonment as a punishment therefor, cannot insist, upon *habeas corpus*, that such act is "not a crime by any act of Congress, and that as the courts of the United States have no common-law jurisdiction of crimes, the district court had no jurisdiction to try him for the offense." In the Watkins case,<sup>2</sup> there is no suggestion, either in the opinion of the court or the reported argument of counsel, that the presentments under which the prisoner had been convicted were defective in form or substance, or that the act charged therein was not criminal, the chief, if not the only, contention being that the court in which the conviction was had had not been invested with jurisdiction of the offense charged. In the Parks case,<sup>3</sup> there was an un-

<sup>1</sup> *Ex parte Parks*, 93 U. S. 20; *Mo- Cases*, 24 Kan. 700; *In re Coy*, 127  
*Laughlin v. Etchison*, 127 Ind. 474; 22 U. S. 731.  
*Am. St. Rep.* 658; *Ex parte Fil Ki*, 79  
*Cal.* 584; *Prohibitory Amendment* <sup>2</sup> 3 Pet. 193.  
<sup>3</sup> 93 U. S. 20.

doubted attempt to charge a forgery of the class punishable under section 5419 of the Revised Statutes of the United States, and it was "not clear and free from all doubt that the forgery is not within the terms of the statute." Nevertheless the language of the court in both cases is so clear and emphatic as to warrant the assertion that the writ of *habeas corpus* will not, in the national courts, secure the release of the prisoner, though the act of which he has been convicted is an innocent one, for the punishment of which no authority or reason can be shown, other than the sentence of the court under which he is held.

If it be assumed that the court has jurisdiction and power to punish every conceivable act, then it is doubtless true that any deficiency in the indictment cannot be a cause for release upon *habeas corpus*. But no such power has ever been vested in any of our courts. They have been given jurisdiction to try and punish for certain offenses; but they have no power to try and sentence a citizen for an act which is not made criminal by any law. Would it be claimed that under an indictment charging patriotism or chastity, the defendant could be held in custody, and put to his writ of error, because, forsooth, the court in which the indictment was filed was vested with the power to decide whether chastity and patriotism are felonies at common law or by statute? The plain answer would be, that the court had been vested with no criminal jurisdiction over these subjects. If it be true, as written by Lord Hale, that a prisoner ought to be discharged if detained "for a cause for which a man ought not to be imprisoned," then there must be cases in which a discharge must be granted because the charge of which conviction has been had is totally devoid of criminality. In California this view has prevailed, and a prisoner was discharged, though before trial, because the indictment against him showed no crime,—nothing which the court had jurisdiction to pun-

ish.<sup>1</sup> If the complaint or information upon which the conviction was secured was prosecuted in an inferior court of special and limited jurisdiction, there is strong reason for insisting that it state some act constituting a crime,<sup>2</sup> because unless such act is charged, there is a failure to show any subject upon which the court had power to act or punish, and the jurisdiction of such a court must always affirmatively appear. Thus in Kearny's case,<sup>3</sup> he was tried, convicted, and sentenced in the police court of the city and county of San Francisco, under an ordinance thereof providing that no person shall address to another, or utter in the presence of another, any words having a tendency to create a breach of the peace. The court construed this language as meaning that the person against and of whom the opprobrious words were uttered must be present so that he might hear them, and be thereby inclined towards a breach of the peace; and that as the complaint failed to show that such person was present or heard the words spoken, it totally failed to allege a cause of action. "This," said the court, "is not the case of a complaint inartificially drawn, which intimates the existence of the facts necessary to the constitution of the offense, or even of an attempted statement, insufficient but indicating a purpose to declare on the essential facts." There must occasionally occur instances in which the act charged is so clearly one not criminal under any existing law, that the prisoner must be released, whether convicted in a court of limited and special or of general jurisdiction.<sup>4</sup>

It is perhaps impossible to prescribe any general test by which to determine in every case whether an indictment or information, confessedly so imperfect that a demurrer thereto must have been sustained had it been interposed, will so support a conviction founded upon it

<sup>1</sup> *In the Matter of Corryell*, 22 Cal. 178.

<sup>2</sup> *Ex parte Kearny*, 55 Cal. 212.

<sup>3</sup> *Ex parte McNulty*, 77 Cal. 164;

<sup>4</sup> *Post*, sec. 624, 626.

11 Am. St. Rep. 257.

that the person convicted cannot obtain his release upon *habeas corpus*. If it appears from the indictment, whether with technical precision or not, what acts the accused committed, and they are not criminal, either because there is no law declaring them criminal, or because the law so declaring is itself void for the reason that the legislative body which attempted to enact it had no power so to do, then the prisoner should be discharged, for the judicial proceeding against him has merely established that he was guilty of an act for which no court has any power to punish him. If, on the other hand, it is apparent from the record that the grand jury or some other competent accuser has attempted to charge the petitioner with an act which is made criminal by law, and such charge has resulted in his conviction and sentence, then he should be remanded, though the charge was not made with sufficient accuracy or particularity to have withstood a demurrer thereto. In the one case there is an accusation and conviction of a non-criminal act, while in the other there is a conviction of a criminal act based upon an accusation inaccurately, informally, or imperfectly preferred, but yet expressed in such terms that the person accused, the tribunal convicting and sentencing him, and the court or judge appealed to upon *habeas corpus* must know from the indictment that the act thus charged and found to have been committed was a criminal act, and, as such, punishable by law.

§ 623. Jurisdiction over the Person and the Subject-matter may be inquired into upon *habeas corpus*, and if either is found to be wanting, the judgment will be deemed void, and the imprisonment as without lawful authority. If the judge or court which pronounced the sentence is a court or judge *de facto*, the writ of *habeas corpus* cannot be employed as a substitute for *quo warranto* for the purpose of trying the right to office of the judge who pro-

nounced the sentence.<sup>1</sup> But if the sentence proceeds from a court which has no jurisdiction over the subject-matter, — no power to try the cause or to enter judgment therein, — it will be treated as void.<sup>2</sup> In criminal prosecutions as well as in civil actions, the jurisdiction of the court over the subject-matter must be called into action in some manner sanctioned by law. Thus, because the constitution of the United States declares that “no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,” there is no jurisdiction over a crime of the class designated until an indictment or presentment therefor has been found, and when found, it cannot be changed without resubmission to the grand jury; if it is changed by order of the court, and without such resubmission, the court has no power to proceed, and if it does proceed, any resulting judgment of conviction is void.<sup>3</sup>

Where a prisoner is confined in the penitentiary on a judgment for an offense which the court rendering such judgment had no jurisdiction to try, he will be discharged on *habeas corpus*, as where a free colored person was convicted in a court of oyer and terminer for petty larceny, which the statute made triable only by a justice.<sup>4</sup> So where a prisoner was convicted by a military commission sitting in a state in which the operations of the civil courts were unobstructed.<sup>5</sup> So where a prisoner was committed by a justice holding an inquest *super visum corporis*, without being authorized to hold such inquest.<sup>6</sup> The jurisdiction of the legislature to imprison a contumacious witness may be inquired into on *habeas corpus*.<sup>7</sup> Where a

<sup>1</sup> *Griffin's Case*, Chase Dec. 364; *Brown v. United States*, 2 Am. L. T., N. S., 464; *In re Griffin*, 2 Am. L. T. 93; *Sheehan's Case*, 4 Cent. L. J. 524; 122 Mass. 445; 23 Am. Rep. 374; *State v. Bloom*, 17 Wis. 521.

<sup>2</sup> *Miller v. Snyder*, 6 Ind. 1; *Ex* *Jude*. II. — 69

parte *Yarborough*, 110 U. S. 651; *State v. West*, 42 Minn. 147.

<sup>3</sup> *Ex parte Bain*, 121 U. S. 1; *Ex parte Wilson*, 114 U. S. 417.

<sup>4</sup> *Cropper v. Com.*, 2 Rob. (Va.) 842.

<sup>5</sup> *Ex parte Milligan*, 4 Wall. 2.

<sup>6</sup> *Ex parte Schultz*, 6 Wheat. 269.

<sup>7</sup> *Falvey v. Massing*, 7 Wis. 630.



prisoner was convicted in a state court of perjury committed before a United States commissioner, he was discharged on *habeas corpus* by the United States circuit court on the ground that a state court had no jurisdiction of that offense.<sup>1</sup> Where it appears on the face of the record that a justice has exceeded his jurisdiction by issuing execution for a greater sum than allowed by law, the prisoner will be discharged on *habeas corpus*.<sup>2</sup> So where a magistrate issued a warrant for the arrest of a witness for non-attendance before him, the cause in which his testimony was required having been terminated before the warrant issued, it was decided on *habeas corpus* that the issuance of such warrant was in excess of the magistrate's jurisdiction, and the prisoner was discharged.<sup>3</sup>

The question of jurisdiction over the subject-matter may, either in fact or in legal contemplation, become one of the issues to be tried, and the very fact of conviction may show that jurisdiction over it existed. Thus if an indictment charges that an offense was committed within certain territorial limits, over which the court has jurisdiction, whether the offense was so committed is one of the questions to be submitted to the jury, and by them determined, and after they have decided this question by pronouncing their verdict of guilty as charged, the defendant cannot relitigate this issue on *habeas corpus*.<sup>4</sup> It is in all cases essential that the prisoner should have been brought under the jurisdiction of the court which tried him, or which gave the judgment under which the right to detain him is claimed. He must have his day in court. In most cases he must have been arrested or otherwise brought before the court, and we apprehend that personal notice is always essential.<sup>5</sup> Where the want of jurisdiction over the person appears from the return or

<sup>1</sup> *Ex parte Bridges*, 2 Woods, 428.

<sup>2</sup> *Geyger v. Stoy*, 1 Dall. 135.

<sup>3</sup> *Clark's Case*, 12 Cosh. 320.

<sup>4</sup> *Matter of Newton*, 16 Com. B. 97;  
24 L. J. Com. P. 148; 3 Com. L. R.  
1122; 1 Jur., N. S., 591 (Q. B.); *Peo-*

*ple v. Liscomb*, 60 N. Y. 571; 19 Am.  
Rep. 211.

<sup>5</sup> *Mead v. Deputy Marshal of Virginia*, 2 Wheel. C. C. 569; *Rex v. Chancellor*, 1 Strange, 557; *Reynolds v. Orvis*, 7 Cow. 289.

from the record in the action in which the judgment was pronounced, the case is free from embarrassment, and the prisoner must be discharged. With respect to cases in which the record does not disclose the jurisdictional infirmity, we apprehend that there is a want of harmony in the decisions arising out of the great divergence in the opinions of courts upon the extent to which collateral assaults upon judgments may be carried. With respect to courts of record of general jurisdiction, particularly if proceeding by trial by jury, they will be presumed to have proceeded rightfully. When such courts are acting in pursuance of a special and limited jurisdiction conferred by statute, and distinct from their general jurisdiction, the same presumption in their favor exists in some of the states.<sup>1</sup> Jurisdiction must include, in addition to the power to hear and determine, the power to grant the relief which the court assumed to grant. Hence if a court directs a litigant to do something, the doing of which it has no power to direct,<sup>2</sup> as where it commands a defendant to appear in person when he has the right to appear by attorney, and then commits him for contempt in not appearing in person, he must be released on *habeas corpus*.<sup>3</sup> The same result follows disobedience to an order requiring a debtor to surrender certain property to be applied in satisfaction of a judgment, when the statute under which the order was made is unconstitutional.<sup>4</sup>

§ 624. **Conviction without Authority of Law.**—In a preceding section<sup>5</sup> we considered the question whether the prisoner could be discharged because of defects in the indictment or information. The cases there referred to, while they may in one sense be said to involve the

<sup>1</sup> *Deekard v. State*, 38 Md. 186. Upon the general subject of jurisdiction and presumptions thereof, see *Hurd on Habeas Corpus*, 370.

<sup>2</sup> *Ex parte Fish*, 113 U. S. 713; *Ex parte Rowland*, 104 U. S. 604; *In re Ayers*, 123 U. S. 443.

<sup>3</sup> *Ex parte Gordon*, Sup. Ct. Cal., Dec. 1891.

<sup>4</sup> *Ex parte Grace*, 12 Iowa, 206; 79 Am. Dec. 529.

<sup>5</sup> *Ante*, sec. 622.

inquiry whether the conviction was without the authority of law, or in the absence of the allegation of facts which the existing laws made punishable as a crime, yet generally involved mere questions of the sufficiency of pleadings. The question of which we now wish to speak is not so much one of pleading; it is, whether it may be shown that the act of which the judgment shows a conviction is, owing to some defect in the law, or owing to the absence of any law, upon the subject, no crime at all. It may be said, on the one hand, that the court in which the prosecution and conviction were had possessed the jurisdiction to inquire and determine what the law was; and on the other, that the conviction of a lawful and innocent act cannot warrant the deprivation of the liberty of the citizen or the infliction of any other punishment on him. In some of the cases convictions have been had under statutes standing unrepealed upon the books, and the discharge of the prisoner on *habeas corpus* has been claimed on the ground that such statutes were unconstitutional and void, and therefore that the act of which the prisoner was convicted was not criminal. An unconstitutional enactment is never a law; and if there can be a case in which a conviction is illegal and without jurisdiction, it seems that such a case is presented when it appears either that there is no law making criminal the alleged crime, or authorizing its prosecution in the court wherein the sentence has been imposed. Nevertheless, a number of the adjudications upon this subject affirm that the constitutionality of the law is a question which the court convicting may determine; and that a conviction necessarily affirms the constitutionality of the statute; and that this affirmance cannot be avoided on *habeas corpus*.<sup>1</sup> So it has been held that on *habeas corpus* the force of the conviction cannot be destroyed

<sup>1</sup> *Matter of Underwood*, 30 Mich. parte *Fisher*, 6 Neb. 309; *Ex parte* 502; *Ex parte Booth*, 3 Wis. 145; *Boenninghausen*, 91 Mo. 301. *Matter of Harris*, 47 Mo. 164; *Ex*

by showing that the statute authorizing it had been repealed before the judgment was rendered,<sup>1</sup> or that it was entered as the result of a prosecution under a void ordinance of a municipal corporation.<sup>2</sup> The decisions so far cited in the present section do not commend themselves to our understanding, and unavoidably support the conclusion that the citizen may not obtain release upon *habeas corpus*, although it appears that the act of which he was convicted was not criminal under the laws of his country, or even that the constitution of the state or nation has put it beyond the legislative power to punish such act as an offense. With respect to unconstitutional statutes, we rather yield our assent to the reasoning thus expressed by Mr. Justice Bradley in the supreme court of the United States:<sup>3</sup> "The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed in *habeas corpus* by a superior court or judge having authority to award the writ. We are satisfied the present is one of the cases in which the court is authorized to take such jurisdiction. We think so because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the

<sup>1</sup> *Ex parte Winston*, 9 Nev. 71; *In re Callicot*, 8 Blatchf. 89.

<sup>2</sup> *Ex parte Siebold*, 100 U. S. 376; *Herrick v. Smith*, 1 Gray, 49; 61 Am.

<sup>3</sup> *Platt v. Harrison*, 6 Iowa, 79; 71 Am. Dec. 389.

causes." We apprehend that the courts of the different states will yield to this high authority, and refuse to retain in prison persons whose only crime is that of having violated an enactment which is a law in form only, and against the enforcement of which the people have stipulated in their fundamental law.<sup>1</sup> Upon principle, a conviction under a statute which has been repealed, or a municipal ordinance which is invalid, cannot warrant the imprisonment of the person convicted, and he should therefore be released on *habeas corpus*.<sup>2</sup>

When it is alleged that the law under which the prisoner has been convicted is void, the allegation, if sustained, must rest upon one of two grounds, viz.: 1. That the legislative body which passed the enactment had no power to do so under any circumstances; or 2. That though such body had, under some circumstances, the power to make such enactment, this power did not exist in the present case for want of compliance with some essential formality. When the conviction has taken place under an ordinance of a municipal corporation, it may, we think, be shown that the ordinance, or that portion of it requisite to sustain the conviction, is void because the city council or other legislative body had no power to enact such an ordinance,<sup>3</sup> but we have been unable to discover any authority showing whether the court on *habeas corpus* may take testimony for the purpose of determining whether the ordinance was passed or published with due formality.

All courts will take judicial notice of the general laws of the land, and if, viewed by those laws, the conviction and sentence is for an act possessing "a clear and manifest want of criminality," the prisoner will be discharged.

<sup>1</sup> Ex parte Rosenblatt, 19 Nev. 439; 3 Am. St. Rep. 901; Ex parte Rollins, 80 Va. 314; Ex parte Mato, 19 Tex. App. 112; Brown v. Duffus, 66 Iowa, 193; Whitcomb's Case, 120 Mass. 118; 21 Am. Rep. 502.

<sup>2</sup> Hirschburg v. People, 6 Cal. 145; Ex parte Grace, 9 Tex. App. 381; Ex parte Burnett, 30 Ala. 461; People v. Roff, 3 Park Cr. 216.

<sup>3</sup> Ex parte Burnett, 30 Ala. 461; People v. Roff, 3 Park Cr. 216.

The leading authority on this subject is *Bushel's Case*.<sup>1</sup> "There twelve jurymen had been convicted in theoyer and terminer for rendering a verdict (against the charge of the court) acquitting William Penn and others, who were charged with meeting in conventicle. Being imprisoned for refusing to pay their fines, they applied to the court of common pleas for a *habeas corpus*; and though the court, having no jurisdiction in criminal matters, hesitated to grant the writ, yet having granted it, they discharged the prisoners on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose. The opinion of Chief Justice Vaughan in the case has rarely been excelled for judicial eloquence."<sup>2</sup>

Courts have no power to try and punish twice for the same crime; and where it appears by the record that the offense for which the prisoner is suffering imprisonment is one for which he has been already convicted and punished, he must be released. Thus the crime, created by the act of Congress of March 22, 1882, of cohabiting with more than one woman, is a continuous offense, and not an isolated act; and every conviction under this statute includes all the offenses of which the accused was guilty prior to the finding of the indictment against him, and if he is in custody under a subsequent conviction for cohabiting prior to the finding of such indictment, though with another woman, he must be released.<sup>3</sup>

§ 625. *Sentence not Warranted by Law.*—Jurisdiction is ordinarily defined as the power to hear and determine, and where the existence of this power is conceded, no mere error or irregularity in its exercise can ordinarily render the judgment null. A person may be indicted for a crime; he may be present in court, and the court may have full power to hear and determine the cause, and to

<sup>1</sup> T. Jones, 13; Vaughan, 135; 6 How. St. Tr. 999.

<sup>2</sup> In re Snow, 120 U. S. 274; In re Nelson, 131 U. S. 176.

<sup>3</sup> Ex parte Siebold, 100 U. S. 376.

pronounce sentence in the event that a verdict of guilty should be returned by the jury. The law usually prescribes what this sentence shall be, or at least prescribes certain limits within which the sentence must be confined, as that the prisoner shall be imprisoned in the state prison for not less than one nor more than ten years. If, however, the court should, in the case assumed, sentence the prisoner to less than one or more than ten years, its sentence is clearly not warranted by the law; but whether its action is a mere erroneous exercise of jurisdiction, and therefore voidable only, or is beyond and without its jurisdiction, and therefore void, is a more difficult question. In the case of *Ex parte Shaw*,<sup>1</sup> the prisoner having been convicted of horse-stealing, and having been sentenced to one year's imprisonment, when the statute required such sentence to be for not less than three years, was brought before the court on *habeas corpus*, and insisted by his counsel that the judgment was void. The supreme court thought the sentence complained of, while the result of error or mistake, was nevertheless valid. It ought, we think, to be conceded in law, as in mathematics, that the greater number always contains and includes the less, and that the power to impose a punishment of a specified duration includes the power to impose a punishment of the same character but of less extent. Directly opposed to this view is the opinion of Department One of the supreme court of California.<sup>2</sup> The prisoner had been convicted in a police court having jurisdiction over his person and over the offense of which he was accused, and the law required him to be punished by a fine of not less than one hundred dollars, or by imprisonment not exceeding thirty days in case the fine was not paid. The court fined him twenty dollars only, and directed that in default in the payment thereof he be confined in the county jail

<sup>1</sup> *Ex parte Shaw*, 7 Ohio St. 81; 70 Am. Dec. 55. See also *People v. Cavanagh*, 2 Abb. Pr. 89, where it was said that error in sentencing a prisoner to the county jail, instead of the penitentiary, formed no ground for discharge on *habeas corpus*.

<sup>2</sup> *Ex parte Bernart*, 62 Cal. 534.

for the period of ten days. The supreme court construed the statute as prohibiting the police court, in the case under consideration, from imposing any fine less than one hundred dollars, and deemed its judgment not erroneous merely, but void. It was admitted that perhaps if the prisoner had appealed the judgment would not have been reversed, because upon appeal he would not be heard to complain of an error which did not injure him, and which was unmistakably in his favor. The prisoner was discharged. This case is very extreme in its character. It is perhaps the logical result of other cases which have declared sentences other than those which the law affixed, or directed the court to affix, as being without the authority of law, and therefore as utterly void.

In a case where the sentence is in excess of that sanctioned by law, the equities of the prisoner are much more persuasive; and it is not strange that, in the protection of personal liberty, many courts have declined to treat such a sentence as a mere error, but have, at least as to such excess, adjudged it to be void. In some instances, however, such sentences have been sustained on *habeas corpus*. In *Ex parte Bond*,<sup>1</sup> the prisoner had been convicted of an assault with intent to kill, and sentenced to confinement in the penitentiary, and it appeared that such offense was not punishable by confinement in such prison. The supreme court held that as the court *a quo* had general jurisdiction of the subject-matter, its judgment, though erroneous, was voidable only by appeal. So in *Ex parte Crandall*,<sup>2</sup> the prisoner was prosecuted upon an information against him for an assault with intent to kill. The verdict found him guilty of "an assault as charged against him in the indictment." He was sentenced to imprisonment in the county jail for six months, and to pay a fine of five hundred dollars and costs of prosecution, taxed at forty dollars and eighty-nine cents. It was claimed that the court had no power to impose the fine in addition to

<sup>1</sup> 9 S. C. 80; 30 Am. Rep. 20.

<sup>2</sup> 24 Wis. 177.



the imprisonment. The error, if any, was thought not to involve the jurisdiction of the court, and the prisoner was remanded to the custody of the sheriff, and this principle is still maintained and applied in the courts of Wisconsin.<sup>1</sup> In Ohio, if the sentence inflicted is in excess of that authorized by law, it is erroneous merely, and not absolutely void. Relief can be had only by writ of error.<sup>2</sup> In New York and West Virginia, if a sentence is in excess of that warranted by law, "the whole sentence is not illegal and void because of the excess," and the prisoner may be subjected to that part of the sentence which was authorized.<sup>3</sup> And where this construction of the law is adopted by the highest court in a state, relief therefrom cannot be had by appeal to the supreme court of the United States. "When the highest court of a state holds that a judgment of one of its inferior courts imposing punishment in a criminal case is valid and binding to the extent in which the law of the state authorized the punishment, and only void for the excess, we cannot treat it as wholly void, there being no principle of federal law involved in such ruling."<sup>4</sup> In the year 1752, Collyer and Capon were brought before the court of king's bench on *habeas corpus*, whereupon it appeared that they, being convicted by a court of quarter sessions of an assault on Thomas Smith, were "committed to New Prison, Clerkenwell, for the space of one month, and to ask pardon upon their knees of the said Thomas Smith, at the place where the offense was committed, and to cause an account of the said sentence to be printed in the Daily Advertiser, and not to be discharged out of prison until they have undergone such imprisonment, asked such pardon, and caused such account to be published." By the court: "Every part of the judgment is illegal except the imprisonment. It has been said that the proper way for the defendants to be

<sup>1</sup> In re Graham, 74 Wis. 450.

parte Mooney, 26 W. Va. 26; 53 Am

<sup>2</sup> Ex parte Van Hagan, 25 Ohio St.

Rep. 59.

432.

<sup>4</sup> In re Graham, 138 U. S. 461.

<sup>3</sup> People v. Baker, 89 N. Y. 460; Ex

relieved against any part of this judgment is by writ of error. But it would be very hard that the defendants should continue in prison under the illegal parts of this judgment, until they can obtain a reversal of those parts upon writ of error."<sup>1</sup> The prisoners were discharged. As the court of quarter sessions probably had no power, in any case, to sentence persons to ask pardon on their knees, or to publish an account of their sentence, their judgment in this case was very manifestly without any authority in law. In a more recent case the judgment of certain justices which, among other matters, required the defendants to find recognizances not to offend again was, as to such requirement, treated as void, because in excess of the law.<sup>2</sup> This decision has since been explained by showing that it arose out of a summary conviction to which no writ of error applied; and the court refused to follow it with respect to an order made by a judge of a court of general and competent jurisdiction, holding that such order must be either obeyed, or reversed by appeal or writ of error.<sup>3</sup>

In *Ex parte Page*,<sup>4</sup> the prisoner, after conviction for grand larceny, was sentenced to imprisonment for ten years, being three years in excess of the greatest term specified by law as a punishment for such crime. He was released on *habeas corpus*, on the ground that it appeared from the record itself, and without any resort to extrinsic evidence, that the court exceeded its jurisdiction. In this case the judgment was treated as wholly void, and the prisoner released, though he had not yet been imprisoned for the length of time for which the court might lawfully have directed his imprisonment; and it was said that, "in England, the settled practice is, that where an inferior court on a valid indictment transcends its power in passing sentence, by giving one which the law does not au-

<sup>1</sup> *Rex v. Collyer, Sayers*, 44.

<sup>2</sup> *In re Reynolds*, 1 Dowl. & L.

846.

<sup>3</sup> *Ex parte Dunn*, 5 Dowl. & L. 345;

5 Com. B. 215; 12 Jur. 99; 17 L. J. Com. P. 106. See also *Brenan's Case*, 59 Eng. Com. L. 492.

<sup>4</sup> 49 Mo. 291.

thorize, the superior or appellate court will neither pass the proper sentence nor send back the record to the court below, in order that they may do so, but that they will reverse the judgment and discharge the prisoner."<sup>1</sup> If upon return to a *habeas corpus* it appears that the prisoner has been committed for contempt, no limit being fixed for his imprisonment, when the statute prescribes that such imprisonment shall not exceed thirty days, he may be discharged.<sup>2</sup>

The supreme court of the United States has very fully and explicitly committed itself to the doctrine that a sentence or decree, though made by a court having general jurisdiction over the person and subject-matter, is, whether in proceedings civil or criminal as to any relief given or sentence imposed beyond that authorized by law, simply void. Thus the district courts of the United States were, under the confiscation act of July 17, 1862, given jurisdiction over certain proceedings *in rem* for the condemnation and sale of property seized by the United States, and alleged to belong to persons who had been engaged in the Rebellion, or had given aid and comfort thereto. A joint resolution of Congress passed concurrently with this act provided that no proceedings against the offender should work a forfeiture of his estate beyond his natural life. A decree against the property of French Forrest was so worded that it was claimed to affect all his estate, right, title, and interest in the property. He in fact held an estate in fee-simple. The purchaser under this decree therefore insisted, in a suit brought by Forrest's heir, that the latter could not have any title in the premises, because the decree and the sale in pursuance thereof necessarily transferred the fee, and left nothing for the heir to inherit. The court said that assuming the decree to be as contended, yet the power of the district court un-

<sup>1</sup> *Ex parte Page*, 49 Mo. 293; citing *King v. Ellis*, 5 Barn. & C. 395; *King v. Bonne*, 7 Ad. & El. 58.

<sup>2</sup> *Shank's Case*, 15 Abb. Pr., N. S., 38.

der the act did not extend to the ordering of "a sale which should confer upon the purchaser rights outlasting the life of French Forrest."<sup>1</sup> As in this case the court found that the decree did not on its face, when taken in connection with the statute, bear the construction claimed by the purchaser, the remarks of the supreme court upon the *power* of the district court might justly be regarded as mere *dicta* but for the fact that they are relied upon as authority in subsequent cases, and particularly in *Ex parte Lange*, 18 Wall. 163, 177. In the latter case, Edward Lange had been convicted in the circuit court of the United States for the southern district of New York of stealing, purloining, and embezzling certain mail-bags belonging to the post-office department, and thereupon had been sentenced to one year's imprisonment, *and* to pay a fine of two hundred dollars. The statute authorized the court to imprison *or* fine, but not to do both. Lange was at once committed to jail. On the next day he paid his fine. Five days after the original sentence was imposed, and four days after the fine was paid, and while he was yet in prison, Lange was brought into the same court upon *habeas corpus*, when the court entered an order vacating its former judgment, and again sentenced the prisoner to one year's imprisonment from the date of this last sentence. A petition for a writ of *habeas corpus* was subsequently presented to the supreme court, which ordered the writ to issue, and with it a writ of *certiorari* to bring up the records and proceedings in the circuit court. In his return to the writ, the marshal claimed to hold the prisoner under the last sentence. While disclaiming any right to review upon this writ the proceedings of the circuit court for mere error, the supreme court considered itself bound to inquire whether the former court had not *exceeded its powers*. The court, in its opinion, proceeded at great length to show that no

<sup>1</sup> *Bigelow v. Forrest*, 9 Wall. 351.

person could be twice put in jeopardy for the same act or upon the same accusation, and that the true reason for this was that no person should be *twice punished* for the same offense. "For of what avail," inquired the court, "is the constitutional protection against more than one trial if there can be any number of sentences on the same verdict?" The final conclusion of the court was that the prisoner could not be held under the second sentence, because the power of the court was exhausted by the first. "Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain."<sup>1</sup> It was upon the ground that but one sentence can be imposed as the result of one judgment of

<sup>1</sup> *Ex parte Lange*, 18 Wall. 178. At page 176 the court also say: "We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist. It is no answer to this to say that the court had jurisdiction of the person of the

prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So if a court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, it would, for the same reason, be void. Or if on an indictment for treason the court should render a judgment of attainder, whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court, be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court and by the constitution." In a subsequent case the supreme court explained the foregoing decision as follows: "In *Ex parte Lange* we proceeded on the ground that when the court rendered its second judgment, the case was entirely out of its hands. It was *functus officio* in regard to it. The judgment first rendered had been executed and satisfied. The subsequent proceedings are therefore, according to our view, void."

conviction that William M. Tweed obtained his release upon *habeas corpus*, though it appeared that the indictment upon which he was tried and found guilty charged many distinct offenses.<sup>1</sup>

§ 626. The National Courts and judges have the power to issue writs of *habeas corpus*;<sup>2</sup> and the writ may extend to a prisoner who is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the constitution, or of a law or treaty of the United States; or being a subject or citizen of a foreign state, and domiciled therein, is in custody for any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations."<sup>3</sup> Under this section it is perfectly obvious that persons may be discharged on *habeas corpus*, though convicted after a regular prosecution and trial. The record of conviction would disclose the act for which the sentence was imposed; and if it appeared to be one of the acts or omissions mentioned in the Revised Statutes, or if the imprisonment appeared to be in violation of the constitution, or of any law or treaty of the United States, then the discharge of the prisoner follows as a matter of course.<sup>4</sup> But the national courts will not assume that the state courts will deny a prisoner any right guaranteed to him by the laws or constitution of the United States, or punish him for any act done or omitted in pursuance thereof; and they will not, therefore, in the absence of special circumstances, interpose until the defendant has pursued the remedies available to him in the

<sup>1</sup> *People ex rel. Tweed v. Liscomb*, 80 N. Y. 559; 19 Am. Rep. 211.

<sup>2</sup> U. S. Rev. Stat., secs. 751, 752.

<sup>3</sup> U. S. Rev. Stat., sec. 753.

<sup>4</sup> *United States v. McClay*, 4 Cent. L. J. 255; *Ex parte Bridges*, 2 Woods,

428; *In re Wong Yung Quy*, 9 Rep. 366; 4 Pac. L. J. 564; 6 Saw. 442; *Ex parte McReady*, 1 High, 598; *Ex parte Royall*, 117 U. S. 241; *In re Neagle*, 135 U. S. 1.

state courts;<sup>1</sup> and though he has been convicted and sentenced, he will be denied a writ of *habeas corpus* if it appears that the question is one which may, if properly presented by the record, be reviewed in the supreme court of the state, and if there decided adversely to the prisoner, may be brought before the supreme court of the United States by a writ of error.<sup>2</sup>

<sup>1</sup> *Ex parte Royall*, 117 U. S. 263.

<sup>2</sup> *Ex parte Fonda*, 117 U. S. 514.

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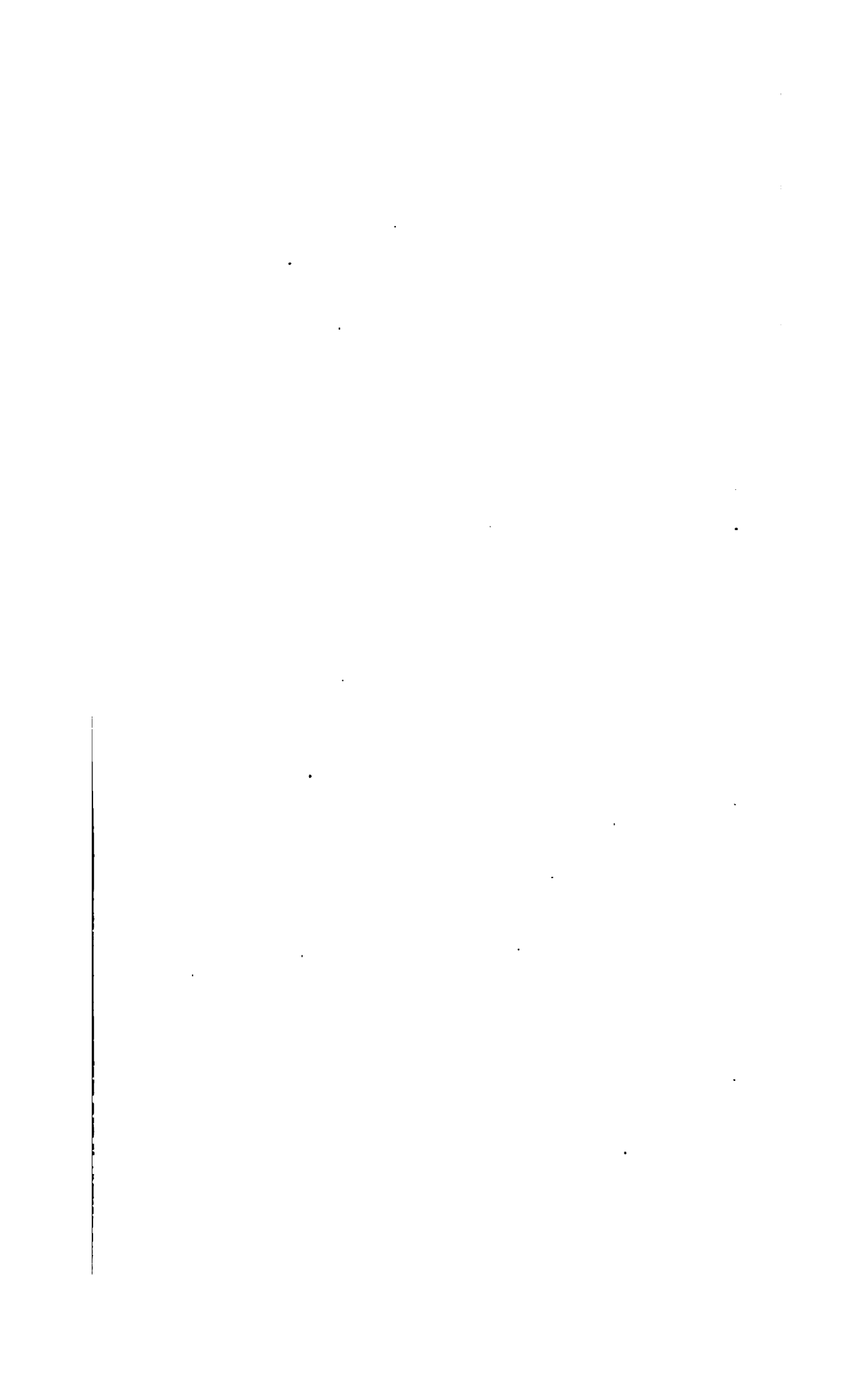
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